5-673

Dec 27 1877

submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 167.

THE FIRST NATIONAL BANK OF KANSAS CITY, PLAINTIFF IN ERROR,

vs.

THE HARTFORD FIRE-INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED OCTOBER 7, 1875.

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John Swayne

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable judges of the circuit court of the United States for the western district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you at the April term, 1875, thereof, between the First National Bank of Kansas City, plaintiff, and the Hartford Fire-Insurance Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington City, District of Columbia, on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that
2 error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 27th day of April, in the year of our Lord one thousand eight hundred and seventy-five. Issued at office, in the city of Jefferson, under the seal of the circuit court of the United States for the western district of Missouri, dated as aforesaid.

[SEAL.] H. C. GEISBERG,
Clerk of the United States Circuit Court West'n Dist. Mo.

Allowed by—

JOHN F. DILLON, *Judge.*

3 UNITED STATES OF AMERICA,
Western District of Missouri, sct:

In obedience to the command of the above writ of error, I herewith transmit to the Supreme Court of the United States a certified transcript of the record and proceedings in the within-entitled cause, together with all things concerning the same.

In witness whereof I have hereunto subscribed my name, at office, in the city of Jefferson, in said district, this third day of September, A. D. 1875.

H. C. GEISBERG,
Clerk U. S. Circuit Court Western Dist. of Mo.

4 (Indorsed:) 198. First National Bank of Kansas City vs. The Hartford Fire-Insurance Co. Writ of error.

5 The United States of America to the Hartford Fire-Insurance Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington City, in the District of Columbia, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of

the United States for the western district of Missouri, wherein the First National Bank of Kansas City is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John F. Dillon, judge of the circuit court of the United States for the western district of Missouri, on this 27th day of April, 1875.

JOHN F. DILLON,
Judge U. S. Circuit Court Western Dist. of Mo.

Service of citation accepted this 30th day of April, 1875.

GAGE & LADD,
Att'ys for Defendant in Error.

6 (Indorsed:) 198. First National Bank of Kansas City vs. The Hartford Fire-Insurance Co. Citation.

7 UNITED STATES OF AMERICA,
Western District of Missouri:

Pleas before the honorable circuit court of the United States for the western district of Missouri, at the April term thereof, 1875, in case of—

THE FIRST NATIONAL BANK OF KANSAS CITY, Missouri, plaintiff,
against
THE HARTFORD FIRE-INSURANCE COMPANY, defendant.

Be it remembered that heretofore, to wit, at the regular November term, 1873, of the United States circuit court for the western district of Missouri, begun and held at Jefferson City, in said district, on the 17th day of November, 1873, and on the 18th day of November, 1873, the following proceedings were entered of record, to wit:

Transcript filed & case docketed.

FIRST NATIONAL BANK OF KANSAS CITY
vs.
THE HARTFORD INSURANCE COMPANY. } No. 198.

Now comes the defendant, by its attorneys, Gage & Ladd, and produce to the court here the transcript in this cause, from the Kan-
8 sas City special law and equity court, which is ordered filed and docketed.

Which said transcript is in words and figures following, to wit:

Transcript.

Be it remembered that heretofore, to wit, on the 18th day of April, A D. 1873, there was filed in the office of the clerk of the special law and equity court of Jackson County, Missouri, a petition; which said petition is in words and figures following:

Petition.

In the special law and equity court of Jackson County, at Independence.

THE FIRST NATIONAL BANK OF KANSAS CITY, plaintiff, *against* THE HARTFORD FIRE-INSURANCE COMPANY of Hartford, Conn., defendant. } Petition.

Plaintiff alleges that it is a corporation duly organized under the laws of the United States, and that defendant is a corporation duly created under the laws of the State of Connecticut.

That defendant, by its policy of insurance, numbered 1462, herewith filed, dated at Kansas City on the 11th day of November, A. D. 1872, duly signed, countersigned, and attested, in consideration of the sum of one hundred dollars, to it paid by W. D. Oldham, of said
9 city, did undertake and agree with said Oldham to insure him, said Oldham, against loss or damage by fire to the amount of twenty-five hundred dollars, on the following-described property, to wit: Twelve hundred and fifty dollars ($1,250.00) on his three-story brick metal-roof building, with stone basement, and on two and one story brick, metal-roof addition adjoining & communicating on the east side said building being known as the "Phœnix Mills," and occupied by the assurer as a flour and grist mill, situate on lots 1, 2, 3, and 4, block C, old town Kansas City, Mo.; and twelve hundred and fifty dollars ($1,250.00) on fixed and movable machinery, gearing, belting, and engine, all contained within the described mill.

That said policy of insurance was by its terms to continue in force for one year, commencing on the 11th day of November, A. D. 1872, at 12 o'clock noon, and terminating on the 11th day of November, A. D. 1873, at 12 o'clock noon, and by said policy said defendant did promise to make good to said Oldham all such loss or damage to said property as should happen by fire during said term, commencing and terminating as aforesaid, not exceeding the sum insured at the time of the loss, to be payable within sixty days after notice and proof of loss made by said Oldham. Plaintiff states that at the date of said policy,
10 said Oldham was and now is largely indebted to this plaintiff, and for the purpose of securing the payment of said indebtedness did transfer and assign to this plaintiff the policy aforesaid, and all rights thereunder, and at the request of said Oldham said policy was by this defendant transferred to this plaintiff by writing upon the face of the same that loss, if any, should be payable to this plaintiff as its interest should appear, and by delivering said policy to this plaintiff.

That this plaintiff at the date of the fire hereinafter set forth, had and still has an interest in the property destroyed and in said policy to the full amount insured.

Plaintiff states that on the night of the 7th day of December, A. D. 1872, and while said policy was in force, the property hereinbefore described, consisting of the building described in said policy, and the machinery, gearing, belting, and engine contained in said building together, of the value of twenty thousand dollars, ($20,000.00,) and all being then the property of said Oldham, were totally destroyed by fire, by reason of which destruction by fire said Oldham sustained loss and damage to the amount of twenty thousand dollars ($20,000.00.)

That on or about the 6th day of January, A. D. 1873, said Old-
11 ham notified the defendant of the loss aforesaid, and delivered to the defendant at its office in Chicago, Illinois, a particular account of said loss as required by the terms of said policy, and duly performed all the conditions on his part to be performed by the terms of said policy. That said defendant, though more than sixty days have elapsed since said notice and proof of loss due, this plaintiff has demanded payment, has not paid said sum of twelve hundred and fifty dollars, ($1,250.00,) nor any part thereof, on account of the loss sustained by the destruction of said "Phœnix Mills" by fire as aforesaid, nor the sum of twelve hundred and fifty dollars, ($1,250.00,) nor any part thereof on the machinery, gearing, belting, and engine contained within said mill, and also destroyed by fire as aforesaid.

Wherefore plaintiff prays judgment for the sum of twenty-five hundred dollars, $2,500.00, with interest thereon, at the rate of 6 per cent. per annum, from the 6th day of January, A. D. 1873, and for costs and for all proper relief.

TOMLINSON & ROSS.

KIMBALL & CRAVENS,
Att'ys for P'l'ff.

And upon the filing of said petition there was issued a writ of
12 summons, which said writ is in words and figures following, to wit:

Summons.

Special law and equity court summons.

The State of Missouri, to the sheriff of Jackson County, greeting:

You are hereby commanded to summon The Hartford Fire-Insurance Company of Hartford, Conn., if it be found in your county, that it be and appear before the honorable judge of our special law and equity court of Jackson County, at the court-house in the city of Independence, on the first Monday in May next, it being the 5th day of said month, then and there to answer unto the complaint of The First National Bank of Kansas City, as set forth in the foregoing petition, and that you then and there have this writ, and that you certify how you execute the same.

Witness, Wallace Laws, clerk of the circuit court of Jackson County, and ex officio clerk of the special law and equity court of Jackson County, with the seal of said special law and equity court hereto affixed at office in Independence City, this 18th day of April, A. D. 1873.

[SEAL.] WALLACE LAWS, *Clerk*,
By SAM. R. RALLS, *D. C.*

13 And on the back of said writ is the sheriff's return thereon in words and figures following, to wit:

Sheriff's return.

I, C. B. L. Boothe, sheriff of Jackson County, certify that I executed this command by leaving a copy of this petition and a copy of the summons attached at the business office of the within-named defendant, with C. T. Rothenel, the person having charge thereof in the absence of the president, a chief officer of the defendants' corporation. Done in Jackson County, Missouri, the 18th day of April, 1873.

C. B. L. BOOTHE, *Sheriff.*
By ASA MADDOX, *Deputy.*

Fee. $1.00.

And be it further remembered that at the regular May term, A. D. 1873, of our special law and equity court within and for Jackson County, on the 2d day thereof, the same being the 7th day of said month, the following among other proceedings were had, to wit:

Petition for removal of cause filed. Order of removal to U. S. cir. court.

FIRST NATIONAL BANK OF KANSAS CITY
vs.
THE HARTFORD FIRE-INSURANCE COMPANY of Hartford, Conn. } 65th.

Now, at this day comes the defendant, The Hartford Fire-Insur-
14 ance Company, of Hartford, Connecticut, by Gage and Ladd, its attorneys, and enters its appearance in this cause, and at the same time fixes its petition for removal of this cause for trial into the next circuit court of the United States to be held in the western district of Missouri, and also files and offers security for its entering in said circuit court of the United States, to be held in said western district of Missouri on the first day of its next session, copies of the process in this cause against it, and for its there appearing and entering special bail in this cause, if special bail was originally requisite herein, said petition being filed and said security offered in pursuance of the laws of the United States relating to the removal of causes from the State courts, and said petition being, by consent of the attorneys for the plaintiff herein taken up and heard by the court, it is ordered by the court that the security so offered by the defendant be accepted, the same appearing to the court to be good and sufficient, and that this cause be removed for trial into the next circuit court of the United States to be held in the western district of Missouri, and that no further proceedings be had in this cause in this court.

15 And the petition for removal is in words and figures as follows, to wit:

Petition for removal.

In the special law and equity court of Jackson County, Missouri, at Independence.

THE FIRST NATIONAL BANK OF KANSAS CITY, plaintiff,
against
THE HARTFORD FIRE-INSURANCE COMPANY OF Hartford, Conn., defendant.

The petition of The Hartford Fire-Insurance Company of Hartford, Connecticut, the above-named defendant, respectfully shows to the court that this action entitled as above has been commenced in this court by the above-named plaintiff against this defendant, founded upon a certain insurance policy alleged in said plaintiff's petition, now on file in this cause, to have been executed by this defendant, insuring one W. D. Oldham against loss or damage by fire to the amount of twenty-five hundred dollars ($2,500.00) on certain property in said petition mentioned, and which property is therein alleged to have been destroyed by fire, and that in said petition said plaintiff demands judgment for

That on or about the 6th day of January, A. D. 1873, said Old-
11 ham notified the defendant of the loss aforesaid, and delivered to the defendant at its office in Chicago, Illinois, a particular account of said loss as required by the terms of said policy, and duly performed all the conditions on his part to be performed by the terms of said policy. That said defendant, though more than sixty days have elapsed since said notice and proof of loss due, this plaintiff has demanded payment, has not paid said sum of twelve hundred and fifty dollars, ($1,250.00,) nor any part thereof, on account of the loss sustained by the destruction of said "Phœnix Mills" by fire as aforesaid, nor the sum of twelve hundred and fifty dollars, ($1,250.00,) nor any part thereof on the machinery, gearing, belting, and engine contained within said mill, and also destroyed by fire as aforesaid.

Wherefore plaintiff prays judgment for the sum of twenty-five hundred dollars, $2,500.00, with interest thereon, at the rate of 6 per cent. per annum, from the 6th day of January, A. D. 1873, and for costs and for all proper relief.

TOMLINSON & ROSS.
KIMBALL & CRAVENS,
Att'ys for P'tff.

And upon the filing of said petition there was issued a writ of
12 summons, which said writ is in words and figures following, to wit:

Summons.

Special law and equity court summons.

The State of Missouri, to the sheriff of Jackson County, greeting:

You are hereby commanded to summon The Hartford Fire-Insurance Company of Hartford, Conn., if it be found in your county, that it be and appear before the honorable judge of our special law and equity court of Jackson County, at the court-house in the city of Independence, on the first Monday in May next, it being the 5th day of said month, then and there to answer unto the complaint of The First National Bank of Kansas City, as set forth in the foregoing petition, and that you then and there have this writ, and that you certify how you execute the same.

Witness, Wallace Laws, clerk of the circuit court of Jackson County, and ex officio clerk of the special law and equity court of Jackson County, with the seal of said special law and equity court hereto affixed at office in Independence City, this 18th day of April, A. D. 1873.

[SEAL.] WALLACE LAWS, *Clerk*,
By SAM. R. RALLS, *D. C.*

13 And on the back of said writ is the sheriff's return thereon in words and figures following, to wit:

Sheriff's return.

I, C. B. L. Boothe, sheriff of Jackson County, certify that I executed this command by leaving a copy of this petition and a copy of the summons attached at the business office of the within-named defendant, with C. T. Rothenel, the person having charge thereof in the absence of the president, a chief officer of the defendants' corporation. Done in Jackson County, Missouri, the 18th day of April, 1873.

C. B. L. BOOTHE, *Sheriff.*
By ASA MADDOX, *Deputy.*

Fee. $1.00.

And be it further remembered that at the regular May term, A. D. 1873, of our special law and equity court within and for Jackson County, on the 2d day thereof, the same being the 7th day of said month, the following among other proceedings were had, to wit:

Petition for removal of cause filed. Order of removal to U. S. cir. court.

FIRST NATIONAL BANK OF KANSAS CITY
vs.
THE HARTFORD FIRE-INSURANCE COMPANY of Hartford, Conn. } 65th.

Now, at this day comes the defendant, The Hartford Fire-Insur-
14 ance Company, of Hartford, Connecticut, by Gage and Ladd, its attorneys, and enters its appearance in this cause, and at the same time fixes its petition for removal of this cause for trial into the next circuit court of the United States to be held in the western district of Missouri, and also files and offers security for its entering in said circuit court of the United States, to be held in said western district of Missouri on the first day of its next session, copies of the process in this cause against it, and for its there appearing and entering special bail in this cause, if special bail was originally requisite herein, said petition being filed and said security offered in pursuance of the laws of the United States relating to the removal of causes from the State courts, and said petition being, by consent of the attorneys for the plaintiff herein taken up and heard by the court, it is ordered by the court that the security so offered by the defendant be accepted, the same appearing to the court to be good and sufficient, and that this cause be removed for trial into the next circuit court of the United States to be held in the western district of Missouri, and that no further proceedings be had in this cause in this court.

15 And the petition for removal is in words and figures as follows, to wit:

Petition for removal.

In the special law and equity court of Jackson County, Missouri, at Independence.

THE FIRST NATIONAL BANK OF KANSAS CITY, plaintiff,
against
THE HARTFORD FIRE-INSURANCE COMPANY OF Hartford, Conn., defendant.

The petition of The Hartford Fire-Insurance Company of Hartford, Connecticut, the above-named defendant, respectfully shows to the court that this action entitled as above has been commenced in this court by the above-named plaintiff against this defendant, founded upon a certain insurance policy alleged in said plaintiff's petition, now on file in this cause, to have been executed by this defendant, insuring one W. D. Oldham against loss or damage by fire to the amount of twenty-five hundred dollars ($2,500.00) on certain property in said petition mentioned, and which property is therein alleged to have been destroyed by fire, and that in said petition said plaintiff demands judgment for

15a the said sum of twenty-five hundred dollars and interest thereon from the 6th day of January, 1873, and for costs.

That the matter in dispute in this suit therefore exceeds the sum of five hundred dollars, exclusive of costs.

That said plaintiff was at the time of the commencement of this suit and still is a banking corporation, incorporated and existing and doing business under and by virtue of an act of Congress of the United States entitled an "Act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, and the several acts of Congress amendatory thereof, and was at said time and still is a citizen of the State of Missouri, and located, established, and doing business as such banking corporation, under and by virtue of said act, at Kansas City, in the county of Jackson and State of Missouri.

That this defendant was at the time of the commencement of this suit and still is a corporation created, established, and existing under and by virtue of the laws of the State of Connecticut, and having its principal place of business in the city of Hartford, in said State of Connecticut.

That this defendant herewith offers good and sufficient surety
15b for its entering in the next circuit court of the United States for the western district of Missouri, on the first day of its session, copies of the process against it in this suit, and also for its there appearing and entering special bail in the action if special bail was originally requisite therein.

This defendant, your petitioner, therefore prays this court to accept the surety herewith offered, and that this cause be remanded for trial into the next circuit court of the United States for and to be held in the western district of Missouri pursuant to the act of Congress in such case made and provided, and that this court proceed no further in this cause; and the defendant, your petitioner, will ever pray.

GAGE & LADD,
Att'ys for Petitioner.

STATE OF MISSOURI,
County of Jackson, ss:

being sworn, on his oath says that he is the agent of The Hartford Fire-Insurance Company of Hartford, Connecticut, the above-named defendant and petitioner, and makes his affidavit in its behalf, and that the foregoing petition and the statements therein made are true.

CHA'S ROTHERMEL.

Sworn to and subscribed before me, a notary public within and
16 for said county and State, this 5th day of May, 1873.

In witness whereof I have hereunto set my hand and affixed my notarial seal.

[SEAL.] J. SCOTT HARRISON, J'R,
Notary Public.

And said bond is in words and figures following, to wit:

Bond.

In the special law & equity court of Jackson County, State of Missouri, at Independence.

THE FIRST NATIONAL BANK OF KANSAS CITY, plaintiff,
against
THE HARTFORD FIRE-INSURANCE COMPANY OF Hartford, Conn., defendant.

Know all men by these presents that we, H. W. Chittenden, Sanford

B. Ladd, John C. Gage, and Matt. Foster, of Kansas City, Missouri, are held and firmly bound unto the First National Bank of Kansas City in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said First National Bank of Kansas City, its successors and assigns, for which payment, well and truly to be made,

17 we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 7th day of May, A. D. 1873.

The condition of this obligation is such, that whereas a suit was brought on the 18th day of April, 1873, in the special law and equity court of Jackson County, State of Missouri, held at Independence, by the said First National Bank of Kansas City against the Hartford Fire-Insurance Company of Hartford, Connecticut; and whereas the said Hartford Fire-Insurance Company of Hartford, Connecticut, has entered its appearance in said cause, and at the same time filed its petition in said special law and equity court of Jackson County, Missouri, for the removal of said suit for trial into the next circuit court of the United States to be held in the western district of Missouri:

Now, therefore, if the said Hartford Insurance Company of Hartford, Connecticut, shall enter in said circuit court of the United States for the western district of Missouri, on the first day of its next session, copies of the process in said cause against it, and shall also there appear and enter special bail in said cause, if special bail was originally requisite therein, then this obligation to be void; otherwise to remain in full force.

H. W. CHITTENDEN. [SEAL.]
SANFORD B. LADD. [SEAL.]
JOHN C. GAGE. [SEAL.]
MATT. FOSTER. [SEAL.]

18 STATE OF MISSOURI,
County of Jackson, ss:

I, Wallace Laws, clerk of the circuit court of Jackson County, and ex-officio clerk of the special law and equity court of Jackson County, hereby testfy that the foregoing is a true and correct transcript of the papers and proceedings had and made in the above-entitled cause, as the same now remain of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said special law and equity court of Jackson County, at office in Independence, this 8th day of August, A. D. 1873.

[SEAL.] WALLACE LAWS, *Clerk*,
By E. J. NICKERSON, *D. C.*

Bill of costs:

Wallace Laws, clerk	7 35
C. B. L. Boothe, sheriff	1 15

19 HARTFORD FIRE-INSURANCE COMPANY.

Survey of Phœnix Mills.

The estimated value of personal property and of each building to be insured, and the sum to be insured on each, must be stated separately When personal property is situated in two or more buildings, the value and amount to be insured in each must be stated separately. When insurance is wanted on personal property, the same description should

be given of the building containing the property as if insurance is wanted on the building.

Application of W. D. Oldham, of Kansas City, Mo., for insurance against loss or damage by fire, by the Hartford Fire-Insurance Co., in the sum of twenty-five hundred dollars, on the property specified, the value of the property being estimated by the applicant.

	Sum to be insured.	Valuation.
On buildings.....	$1,250	$15,000
On mach'y, fixed & movable, including engine....	$1,250	$15,000

The applicant will answer the following questions, and sign the same, as a description of the premises on which the insurance will be predicated:

1. Name of premises, and where situated?	1. Pho'nix Mills, East Levee, Kansas City, Mo., block C, lots 1, 2, 3, & 4, Old Town.
2. What kind of goods are made, and of what material? Are wood shavings made on the premises?	2. Flour & meal.
3. Is the building stone, brick, or wood; and of what material is the roof?	3. Brick & stone. Tin.
4. Size, number of stories, and how finished within?	4. Three stories and basement.
5. When built?	5. In the year 1865.
6. Is there a scuttle in the roof with stairs to it? and are there ladders on the building, or at hand, of sufficient length to reach the roof and windows in each story, and ready for use at all times?	6. Yes; and ladder in the mill.
7. How are the premises warmed?	7. One stove in office.
8. If stoves are used, what kind? what is under them? and what space between that and the stove? how far from partition or wood-work? Is the pipe in good order and well secured? does it pass a partition or floor? if so, how secured, and how near does it come to wood? Does it enter a chimney, and is it built from the ground?	8. Coal stove. Zinc. 7 inches. 8 " " Flue built from the ground.
9. Is there a steam-boiler on the premises? where located? how thick are the walls enclosing it? how far from wood-work? and for what purpose is it used?	9. Yes. Walls 18 in.; 5 feet from rafters.
10. Is the boiler-chimney outside? is it built with hollow or single walls? if single, how thick? Do the floors or floor timbers, or roof, come snug up to the chimney? and how far	10. Iron chimney. 3 f't.

Know all men by these presents that W[illegible]

does it rise above the peak of the roof?	
11. Are there any other fires used about the premises? if so, for what purpose? and how secured?	11. No.
12. What is used for fuel? and how are the ashes disposed of?	12. Coal.
13. What material is used for lighting the premises? and how are the lights secured?	13. Coal-oil lamps.
14. How are the several stories occupied?	14.
15. During what hours are the premises worked? by what power propelled? If by water, is the supply sufficient?	15. At times all.
16. Is a watch kept upon the premises during the night? Is there a good watch clock? Is any other duty required of the watchman than watching for the safety of the premises?	16. No.
17. What are the means for extinguishing a fire on the premises? If there be a force-pump, in what part of the building is it? and if within the building, can it be geared from the outside? Is it operated once a week? What is the length of the hose, and is it in good condition? and what length of time is necessary to put the pump into effective operation?	17. None except buckets. Fire dep't of city.
18. Is smoking or drinking of spirituous liquors allowed on the premises? If friction matches are used, how are they kept?	18. No. Tin box.
19. Are the buil'ings and machinery both owned by the applicants? Is there any other person interested in the property?	19. Yes.
20. What is the cash-value of the buildings, aside from hand and water power? What is the cash value of the machinery, and also of the stock in the same?	20. 15,000 building; 15,000 machinery.
21. What amount is now insured on the property? in what offices? and on whose account?—specifying particularly.	21. 15,500. $6,000 Ætna; $4,000 S't Joe; $3,000 Merchants', S't Joe; $2,500 N. B. & M.
22. Is the property mortgaged? if so, state the amount. Is there any insurance by the mortgagee?	22. $20,000. Loss, if any, payable to 1st National Bank, Kansas City, Mo.

And the said applicant hereby covenants and agrees to and with said company that the foregoing is a just, full, and true exposition of all the

facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk.

Dated November 11th, 1872.

W. D. OLDHAM, *Applicant.*

For one year, at 4 cents.

NOTE.—Annex ground-plan of the premises to be insured; also a diagram of all buildings within one hundred feet, designating the material of which they are built and occupation in same.

(Indorsed:) Survey for manufactories other than cotton, woolen, or flouring mills. No. 1462. Kansas City, Mo., agency. Survey of Phœnix Mill. Situate at Kansas City, Mo. Applicant, W. D. Oldham.

23 *Policy of insurance.*

Dollars, 2,500. Number 1462.

THE HARTFORD FIRE-INSURANCE COMPANY,

Capital, $1,000,000. Hartford, Conn.

By this policy of insurance, in consideration of the receipt of one hundred dollars, do insure W. D. Oldham, of Kansas City, Mo., for the amount of twenty-five hundred dollars, for the term of one year, as follows, viz:

$1,250 on his three-story brick metal-roof building, with stone basement, and on two & one story brick metal-roof addition adjoining & communicating on the east side, said building being known as the "Phœnix Mills," and occupied by the assured as a flour & grist mill, situate on lots 1, 2, 3, & 4, block C, Old Town, Kansas City, Mo.

$1,250 on fixed and movable machinery, gearing, belting, and engine; all contained within the described mill.

$15,500 other insurance permitted concurrent herewith.

Special reference being had to assured's application & survey, No. 1462, on file, which is his warranty, and a part hereof.

Loss, if any, payable to 1st National Bank of Kansas City, Mo.

Against all such immediate loss or damage sustained by the assured and his legal representatives as may occur by fire to the property
24 specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided, from the 11th day of November, eighteen hundred and seventy-two, at 12 o'clock noon, to the 11th day of November, eighteen hundred and seventy-three, at 12 o'clock noon, to be paid sixty days after due notice and satisfactory proofs of the same, made by the assured, are received at the office of this company in Chicago, it being covenanted as conditions of this contract that this company may repair, restore, or replace the property lost or damaged, on giving notice of such intention within sixty days after receipt of proofs herein required; in which case the assured shall furnish plans and specifications of property so lost or damaged; and that this company shall not be liable until the actual payment of the premium, nor for loss by theft at or after a fire, nor for loss caused by invasion, insurrection, riot, civil commotion, military or usurped power; nor for loss caused by lightning, or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only; nor for loss or damage caused

by removal of property from a building, where there is no loss by fire, unless such removal was necessary to preserve the property, in which case the damage shall be borne by both parties, in proportion as the whole sum insured bears to the whole value of the property in-
25 sured; nor for loss or damage caused by neglect to use all practicable means to save and preserve the property from damage at and after the fire; and there can be no abandonment to the company of the property insured.

If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy and a warranty by the assured; and if the assured, in a written or verbal application, makes any erroneous representation, or omits to make known any fact material to the risk; or if the assured shall have or shall hereafter make any other insurance on the property hereby insured, whether such other instrument is valid or invalid, without the consent of the company written hereon, or if the risk be increased by any means within the control of the assured; or immediately upon the passing or entry of a degree of foreclosure, or upon a sale under a deed of trust; or if the assured shall be adjudged a bankrupt; or if the property insured be assigned under any bankrupt or insolvent laws; or if any change takes place in the title or possession of the property, whether by sale, transfer, or conveyance, legal process, or judicial decree, or the policy is assigned without consent of the company endorsed thereon; or if the assured is not the sole, absolute, and unconditional owner of the property insured, or (if said property be a building or buildings) of the land on which such building or buildings stand, by title in fee-simple, and this fact is not expressed
25*a* in the written portion of the policy; or if gunpowder, phosphorus, naphtha, benzine, gasoline, or petroleum fluid, crude earth or coal oils, are kept or used on the premises; or if camphene, burning fluid, or refined coal or earth oil are kept for sale, stored, or used on the premises in quantities exceeding one barrel at any one time, without written consent; or if the premises hereby insured shall become vacant or unoccupied; or if the property insured be a mill or manufactory, shall cease to be operated, and so remain for a period of more than fifteen days, without notice to the company, and consent endorsed hereon; or for neglect or deviation from the laws or police regulations made to prevent accidents from fires, then, and in every such case, this policy shall be void. This policy may be canceled at any time at request of assured, the company retaining customary monthly short rates for time policy has been in force. It may also be canceled at any time by the company, on giving written or verbal notice to that effect, and refunding or tendering a ratable proportion of the premium for the unexpired term of the policy.

In case of loss, the insured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire, the occupancy of the building insured or containing the property insured, other
25*b* insurance, if any, and copies of all policies, the whole value and ownership of the property, and the amount of loss or damage; and shall produce the certificate, under seal of a magistrate, notary public, or commissioner of deeds nearest the place of the fire, and not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount

claimed by the said assured. In no case shall the claim be for a greater sum than the actual damage to, or cash value of, the property at the time of the fire, nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or the liability of other insurers. Assignors, unless the assignee owns the property, must make the proofs hereby required. If required, the assured shall produce books of account and other proper vouchers, original or duplicate invoices, and all property hereby insured, whether damaged or not damaged, and be examined under oath by any person appointed by the company, touching all questions by him deemed pertinent to the loss, and subscribe such examination when reduced to writing; and a refusal to answer such questions and subscribe such examination when reduced to writing shall cause a forfeiture of all claims under this policy.

26

Damage to property not totally destroyed, unless the amount of said damage is agreed upon between the assured and the company, shall be appraised by disinterested and competent persons mutually agreed upon by the parties; when personal property is damaged, the assured shall put it in best order possible, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised; and the detailed report of the appraisers in writing, under oath, shall form a part of the proofs hereby required, each party paying one-half the expense of the appraisal; and until such proof and certificates are produced, and examinations and appraisal permitted, the loss shall not be payable; and the company reserves the right to take any part or all of the property appraised, paying market-value therefor in case the damage as appraised is deemed excessive. Any fraud or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy.

Re-insurance to be on the basis that in no event will this company be liable for a sum greater than such portion hereby re-insured bears to the whole sum insured by the company re-insured, and in case of loss this company to pay pro rata, at and in the same time and manner as the company re-insured.

27

It is expressly covenanted by the parties hereto that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, unless commenced within twelve months next after the loss shall have occur'ed; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

And it is further expressly covenanted by the parties hereto that no officer, agent, or representative of this company shall be held to have waived any of the terms and conditions of this policy, unless such waiver shall be endorsed hereon in writing.

N. B.—Books of accounts, securities for money, evidences of debt, deeds, money, bullion, plate, jewels, medals, engravings, paintings, sculptures, ornaments, musical and scientific instruments, models and curiosities, frescoes or wall decorations exceeding in value five dollars per square yard, are not insured unless particularly mentioned in the policy. Plate-glass doors and windows, when the plates are of the dimension of nine square feet or more, fences and other yard fixtures, awnings, signs, sidewalks, prismatic lights outside of the

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wall-lines of any building, store furniture and fixtures, are not insured under this policy unless separately and specifically mentioned.

This policy is made and accepted upon the above express conditions, but shall not be valid unless countersigned by the duly-authorized agent of the Hartford Fire-Insurance Company at Kansas City, Mo.

In witness whereof the said Hartford Fire-Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of Hartford and State of Connecticut.

GEO. L. CHASE,
President.

J. D. BROWNE,
Secretary.

Countersigned at Kansas City, Mo., this 11th day of November, 1872.
H. N. CHITTENDEN & CO., *Agents.*

(Endorsed on back of policy is:) Read this policy. No. 1462. The Hartford Fire-Insurance Company, Hartford, Conn., to W. D. Oldham. Br. mill & mach'y, $2,500. Premium, $100. Policy, .. Filed April 18th, 1873. Wallace Laws, cl'k, by Sam. S. Ralls, d. c. Expires November 11th, 1873.

29 And afterward, during said November term, 1873, of the circuit court of the United States for the western district of Missouri, and on the 21st day of November, 1873, the following proceedings were had, to wit:

Leave to plead.

FIRST NATIONAL BANK OF KANSAS CITY
vs.
HARTFORD INSURANCE CO. } No. 198.

It is ordered by the court that the defendant have leave to answer within twenty days, and that plaintiff plead fifteen days thereafter, and cause continued until the next term of this court.

And afterward, during vacation of said circuit court, and on the 11th day of December, 1873, the following proceedings were had, to wit:

Answer filed.

FIRST NATIONAL BANK KANSAS CITY
vs.
THE HARTFORD INSURANCE COMPANY. } No. 198.

Now comes the defendant, by its attorneys, Gage & Ladd, and files herein answer to petition of plaintiff.

And this answer to plaintiff's petition is in words and figures following, to wit:

30 *Answer.*

In the circuit court of the United States for the western district of Missouri.

THE FIRST NATIONAL BANK OF KANSAS CITY
vs.
THE HARTFORD FIRE-INSURANCE COMPANY,
of Hartford, Conn.

The defendant, for answer to plaintiff's petition herein, admits that

plaintiff is a corporation organized under the laws of the United States and that the defendant is a corporation created under the laws of the State of Connecticut.

Defendant admits that it did, by its policy of insurance mentioned in the petition, undertake and agree with said W. D. Oldham to insure him against loss or damage by fire in the manner, to the amount, and upon the property stated in the petition; that said policy was by its terms to continue in force for one year, commencing and terminating as stated; that by said policy the defendant promised to make good to said Oldham all such loss or damage to said property as should happen by fire during said term, not exceeding the sum insured.

Defendant has no knowledge or information sufficient to form a belief as to whether said Oldham was, at the date of said policy, or has
31 at any time since said date, been largely, or in any sum whatever, indebted to the plaintiff, or whether for the purpose of securing the payment of said alleged indebtedness, or for any purpose whatever, said Oldham did transfer or assign to the plaintiff said policy or any rights thereunder.

Defendant denies that said policy was by the defendant transferred to the plaintiff, by writing upon the face of the same that loss, if any, should be payable to the plaintiff, and it denies that said policy was delivered to the plaintiff.

Defendant denies that on the night of the 7th day of December, A. D. 1872, or at any other time, the property described in the petition, or any part thereof, was totally destroyed by fire; it denies that said property was of the value of twenty thousand dollars, or of any value exceeding ten thousand dollars; it denies that at the time of said alleged destruction said policy was in force, or that by reason of such destruction said Oldham sustained loss or damage to the amount of twenty thousand dollars, or to any amount whatever.

Defendant admits that on the night of said 7th day of December, 1872, the property mentioned in the petition was injured and damaged by fire, but it denies that any portion thereof was totally destroyed, and
32 alleges that the entire damage and injury to said property caused by said fire did not exceed the sum of five thousand dollars; and defendant has no knowledge or information sufficient to form a belief as to whether at said time all or any of the property mentioned was the property of said Oldham.

Defendant says that on or about the 6th day of January, 1873, said Oldham did deliver to the defendant what purported to be an account of said alleged loss; but it denies that said Oldham did, on said date or ever, deliver to the defendant a particular account of said loss, as required by the terms of said policy, or that he performed any of the conditions on his part to be performed by the terms of said policy.

2. And, for further answer and defense, defendant states that said policy of insurance was made by the defendant and accepted by said Oldham upon the express condition that if an application, survey, plan, or description of the property therein insured was referred to in said policy, such application, survey, plan, or description should be considered a part of said policy and a warranty by said Oldham.

That the said W. D. Oldham, before the execution or delivery of the policy of insurance sued on, and for the purpose of obtaining the
33 same, did make, sign, and deliver to the defendant a written and printed survey and application for insurance upon the property mentioned in the petition, which said application and survey was dated

the 11th day of November, A. D. 1872, and was particularly referred to in said policy by a certain writing upon the face thereof in the following words and figures, to wit: "Special reference being had to assured's application and survey, No. 1462, on file, which is his warranty and a part hereof."

That in and by said application and survey so made and signed by said Oldham, and in pursuance of which said policy was executed and delivered to him by the defendant, the said Oldham stated, *stated*, agreed, covenanted, and warranted that the cash-value of the buildings insured by said policy, aside from *h*and and water-power, was, at the date of said application and survey, fifteen thousand dollars.

And the defendant alleges that said statement and warranty so made by said Oldham as to the value of said buildings, was false and untrue; that the cash-value of said buildings was not, at the date of said application and survey, and has not at any time since said date been greater than five thousand dollars.

34 That in and by said application and survey so made and signed by said Oldham, and in pursuance of which said policy was executed and delivered to him by the defendant, the said Oldham stated, covenanted, and agreed, and warranted that the cash-value of the machinery in said buildings was, at the date of said application and survey, fifteen thousand dollars.

And the defendant alleges that said statement and warranty so made by said Oldham as to the value of said machinery was false and untrue; that the cash-value of said machinery was not, at the date of said application and survey, nor has the same at any time since said date been greater than five thousand dollars.

That in and by said application and survey so made and signed by said Oldham, and in pursuance of which said policy of insurance was executed and delivered to him by the defendant, the said Oldham stated, covenanted, agreed, and warranted that the property insured by said policy was, at the date of said application and survey, mortgaged to the amount of twenty thousand dollars, and no more.

And defendant alleges that said statement and warranty so made by said Oldham in said application and survey as to the amount for which said property was mortgaged was false and untrue; that said

35 property was, at the date of said application and survey, mortgaged to the amount of twenty-three thousand two hundred dollars as follows, to wit: By a certain deed of trust, dated the 16th day of April, A. D. 1866, by which one Jesse Wilhite and his wife, (the said Jesse Wilhite being on said day the owner in fee-simple of said property,) conveyed said property to John J. Watkins in trust to secure the payment of a certain promissory note, executed and delivered on said 16th day of April, 1866, by said Wilhite to one Daniel Ensign, by which said Wilhite promised to pay to the said Ensign, or order, the sum of eight thousand dollars in twelve months after the date thereof, with interest thereon at the rate of ten per cent. per annum, on which note there was unpaid of principal and interest at the date of said application and survey, the sum of nine thousand two hundred dollars; also by a certain other deed of trust, dated the 11th day of April, A. D. 1871, by which the said W. D. Oldham and his wife, (the said W. D. Oldham being on said day the owner in fee-simple of said property,) conveyed said property to Edward H. Allen in trust to secure the payment of five certain promissory notes, executed and delivered on said 11th day of April, 1871, by said Oldham to the First National Bank of

36 Kansas City, Missouri, all payable to the order of said First Na-

tional Bank of Kansas City, one thereof for the sum of one thousand dollars, payable in sixty days from its date; one for the sum of one thousand dollars, payable in ninety days from its date, and the other three being for the sum of four thousand dollars each, payable in ninety days from their date, all bearing interest at the rate of ten per cent. from their maturity, upon which said notes there was due and unpaid of principal and interest at the date of said application and survey, the sum of fourteen thousand dollars.

And defendant says that by reason of said breaches of said Oldham's covenants of warranty as to the value of said buildings, and as to the value of said machinery, and as to the amount of mortgages upon said property, said policy of insurance is, and has at all times been, void and of no effect.

3. And, for further answer and defense, defendant states that said policy of insurance was made by the defendant and accepted by the said Oldham upon the express condition that if the said Oldham did, in a written or verbal application, make any erroneous representation or omit to make known any fact material to the risk, their said policy was to be void.

37 And the defendant states that the said W. D. Oldham, before the execution and delivery of the policy of insurance sued on and for the purpose of obtaining the same, did make, sign, and deliver to the defendant a written application for insurance upon the property mentioned in the petition, which said application was dated the 11th day of November, 1872.

That said Oldham in said application stated that the cash-value of the building insured by said policy, aside from *h*and and water-power was, at the date of said application, fifteen thousand dollars. And defendant says that said statement is false and untrue and an erroneous representation of the value of said buildings; that at the date of said application and policy the cash-value was not more than five thousand dollars, and that said Oldham well knew the same; that the statement in said application as to the value of said buildings was falsely and fraudulently made by said Oldham, for the purpose of inducing the defendant to execute and deliver to him the policy sued on.

That said Oldham in said application stated that the cash-value of the machinery in said buildings was, at the date of said application and the issue of the policy sued on, fifteen thousand dollars. And de-

38 fendant says that said statement was false and untrue and an erroneous representation of the value of said machinery; that at the date of said application and policy the cash-value of said machinery was not more than five thousand dollars, and that said Oldham well knew the same; that the statement in said application as to the value of said machinery was falsely and fraudulently made by said Oldham for the purpose of inducing the defendant to execute and deliver to him the policy sued on.

That said Oldham in said application stated that the property insured by said policy was mortgaged to the amount of twenty thousand dollars and no more, and defendant says that said statement was false and untrue and an erroneous representation of the amount of mortgages upon said property; that at the date of said application and policy said property was mortgaged to the amount of twenty-three thousand two hundred dollars, and that said Oldham well knew the same; that said property was at said time subject to the lien of two deeds of trust, one dated the 16th day of April, 1866, by which one Jesse Wilhite and his wife (the said Jesse Wilhite being on said day the owner in fee-sim-

ple of said property) conveyed said property to John J. Watkins in trust to secure the payment of a certain promissory note executed
39 and delivered on said 16th day of April, 1866, by said Wilhite to one Daniel Ensign, by which said Wilhite promised to pay to the said Ensign or order the sum of eight thousand dollars in twelve months after the date thereof, with interest thereon at the rate of ten per cent. per annum, on which said note there was unpaid of principal and interest, at the date of said application, the sum of nine thousand two hundred dollars; the other dated the 11th day of April, 1871, by which the said W. D. Oldham and his wife (the said Oldham being on said day the owner in fee-simple of said property) conveyed said property to Edward H. Allen in trust to secure the payment of five certain promissory notes executed and delivered on said 11th day of April, 1871, by said Oldham to the First National Bank of Kansas City, Missouri, all payable to the order of said First National Bank of Kansas City, one thereof for the sum of one thousand dollars, payable in sixty days from its date; one for the sum of one thousand dollars, payable in ninety days from its date; and the other three being for the sum of four thousand dollars each, payable in ninety days from their date, all bearing interest at the rate of ten per cent. per annum from their maturity, upon which said notes there was due and unpaid of principal and interest, at the date of said application and policy, the sum of fourteen thousand dollars;
40 that the statement in said application as to the amount for which said property was mortgaged was falsely and fraudulently made by said Oldham for the purpose of inducing the defendant to execute and deliver to him the policy sued on; that the defendant, relying upon statements of said Oldham contained in said application as to the value of said buildings and machinery and for the amount for which said property was mortgaged, and believing the same to be true, executed and to said Oldham the policy sued on, but the defendant says that it would not have entered into such contract of insurance with said Oldham had it known that the statements and representations above mentioned, or either of them, were false or untrue.

4. The defendant further answering, and for a fourth defense to plaintiff's action, states that by the terms of said policy and upon the face thereof the building thereby insured are described and warranted by said Oldham to be "a three-story brick metal-roof building, with stone basement and a *a* two and one story brick metal-roof addition adjoining and communicating on the east side, said building being known as the Phœnix Mills, and occupied by the assured as a flour and grist
41 mill;" and the said fixed and movable machinery, gearing, belting, and engine are described and warranted to be contained in such a mill so occupied. And the defendant says that at the time said policy was issued said buildings were not occupied by the assured or by any other person as a flour or grist mill, nor had they been so occupied for the space of more than one month prior thereto, nor were they so occupied at any time subsequent to the issue of said policy and prior to the time of said fire, nor was said fixed and movable machinery, or said gearing, belting, or engine contained in a mill so occupied for the space of more than two months previous to said fire.

Wherefore defendant says that by reason of the premises said policy of insurance is and at all times has been void, and of no effect.

5. Defendant, further answering, and for a fifth defense, states that the said policy of insurance was made by the defendant and accepted by the said Oldham upon the express condition that any fraud or attempt at fraud, or any false swearing on the part of the assured, should

cause a forfeiture of all claims under said policy; and defendant alleges that said Oldham did attempt a fraud upon the defendant in this,
42 that on or about the 6th day of January, 1873, pretenting to comply with the requirements of said policy in that regard, and with the view and for the purpose of cheating and defrauding the defendant, and inducing the defendant to believe that it was liable for the payment of the sum of twenty-five hundred dollars on account of the damage caused by said fire, he (the said Oldham) did present and deliver to the defendant what purported to be an account of the loss by said fire, in which said account he falsely and fraudulently represented to the defendant that the actual cash value of the building described in said policy, exclusive of land, cellar, and foundation, was, at the time immediately preceeding said fire, ten thousand dollars, and that the actual cash value of the machinery, gearing, belting, and engines, as described in said policy, was at the same time ten thousand dollars, when in truth and in fact, as the said Oldham well knew, the actual cash value of said buildings was not more than five thousand dollars at the time immediately preceding said fire, and the cash value of said machinery, gearing, belting, and engine was not at the same time to exceed five thousand dollars.

Wherefore defendant says of the premises all claim under said policy has become forfeited.

43 6. And defendant further answering, says that said policy was made by the defendant and accepted by the said Oldham upon the express condition that in no case should the assured be entitled to recover of the defendant any greater proportion of the loss or damage than the amount insured by said policy should bear to the whole sum insured on said property, whether such other insurance should be by specific or by general or floating policies and without reference to the solvency or the liability of other insurers.

And defendant states that at the time of said fire said property was insured by the Saint Joseph Fire and Marine Insurance Company, of Saint Joseph, Missouri, by a policy dated December 8th, 1871, to expire at noon of December 8th, 1872, for the sum of three thousand dollars, fifteen hundred dollars thereof being on said buildings and fifteen hundred dollars being on said machinery and gearing.

That at the time of said fire said property was also insured by the Merchants' Insurance Company of S't Joseph, Missouri, by a policy dated June 1st, 1871, and expiring at noon of June 1st, 1872, for the sum of fifteen hundred dollars on said buildings and for the sum of fifteen hundred dollars upon said machinery and mill-gearing, which said policy was renewed June 1st, 1872, for the term of one year, to expire
44 at noon of the 1st day of June, 1873.

That at the time of said fire said property was also insured by the North British and Mercantile Insurance Company of London and Edinburgh by a policy dated the 11th day of November, 1872, for the term of one year, for the sum of twelve hundred and fifty dollars upon said buildings and for the sum of twelve hundred and fifty dollars upon said machinery, gearing, belting, and engine.

That at the time of said fire said property was also insured by the Ætna Insurance Company of Hartford, Connecticut, by a policy dated December 7th, 1870, to expire at noon of the 7th day of December, 1871, for the sum of fifteen hundred dollars upon said buildings and for the sum of thirty-five hundred dollars upon said machinery and gearing, which said policy was at its expiration renewed for the further term of one year from said December 7th, 1871, at noon, and at the ex-

piration of said renewal was again renewed for the further term of one year, expiring at noon of the 7th day of December, 1873.

Wherefore defendant prays judgment for its costs.

GAGE & LADD,
Att'ys for Defendant.

45 And afterward, during vacation of said circuit court of the United States, and on the 31st day of January, 1874, the following proceedings were had, to wit:

Replication filed.

FIRST NATIONAL BANK, KANSAS CITY,
vs.
HARTFORD INSURANCE CO. } No. 198.

This day comes the plaintiff, by its attorneys, Lay & Belch, and files replication to defendant's answer; which said replication is in words and figures following, to wit:

Replication.

In the circuit court of the United States for the western district of Missouri.

THE FIRST NATIONAL BANK OF KANSAS CITY, plaintiff,
vs.
THE HARTFORD FIRE INSURANCE COMPANY of Hartford, Connecticut, defendant.

For reply to the second count in defendant's answer, plaintiff denies that by said policy, and on the face thereof, it was pro'ided and expressly agreed by and between said Oldham and defendant that all the conditions of insurance printed on the back of said policy were to be taken as a part of said policy and contract of insurance, and denies that on the back of said policy there was a condition in the words set
46 out in the said count of defendant's answer, or that any such condition as is referred to in the said second count was a part of said policy and contract of insurance, and denies that said Oldham, before the execution or delivery of the policy sued on herein, for the purpose of obtaining the same, or at all, did make, sign, and deliver to defendant any written and printed survey and application for insurance on the property mentioned in the petition; and denies that said application and survey was referred to in said policy by writing upon the face thereof the words "Special reference being had to assured's application and survey No. 1462 on file, which is his warranty and part thereof;" and denies that said policy was executed and delivered to said Oldham in pursuance of said application and survey; and denies that said Oldham ever made such or any application and survey for insurance on said property; and denies that said Oldham, by such application and survey stated, covenanted and warranted that the cash value of the buildings insured by said policy, aside from land and water-power, was, at the date of said application and survey, fifteen thousand dollars, and denies that said Oldham at the dates aforesaid, or at any time, made false or untrue statements or warranties as to the value of

said buildings; but this plaintiff is informed and believes, and alleges the fact to be, that the agent of said defendant, a person of long experience in insurance business, a resident of the city of Kansas,
47 and well informed as to the values of real estate in said city, made application to said Oldham to insure him against loss or damages by fire of the buildings described in the petition in this cause; that said agent, for more than six months before the date of the policy sued on herein, made frequent visits to said buildings, and at sundry times within the said six months before said policy was written and at the date of writing the same, well and thoroughly examined the said buildings and all the machinery and mill-gearing therein, and was fully advised, from his said agent's personal examination of said buildings and machinery, of the value thereof; that said agent did not rely upon any statement or warranty made by said Oldham, but upon his own knowledge from such personal examination and from information derived by him from other persons than the said Oldham.

Plaintiff denies that said Oldham, by such application and survey, or in any manner stated, covenanted, agreed, and warranted that the cash-value of the machinery in the said buildings was at the date of said application and survey fifteen thousand dollars, ($15,000.00,) but alleges that the defendant's agent, from time to time prior to the writing of the policy sued on herein, and at said time, made a careful and
48 thorough examination and survey of said machinery, and himself estimated the cash-value thereof to be fifteen thousand dollars, ($15,000.00.)

Plaintiff denies that said Oldham, at the date aforesaid, or at any time, made any false and untrue statements as to the value of said machinery.

Plaintiff alleges that at the times aforesaid the buildings, exclusive of the land and water-power, were of the value of fifteen thousand dollars, ($15,000.00,) and at said times the machinery in said buildings was of the value of fifteen thousand dollars, ($15,000.00,) and that at the date of the fire by which the said buildings and machinery were destroyed they were of the values aforesaid.

Plaintiff is informed, and alleges the fact to be, that the pretented application and survey, which defendant alleges was made by said Oldham, was not made by said Oldham; that if there be any such instrument in writing and printing, of which this plaintiff has no knowledge or information sufficient to form a belief, then the same was prepared by defendant's agent; that all the blanks were filled by said agent and not by said Oldham, nor at his request; and if the name of said Oldham was signed to said application and survey, it was so signed
49 at the request of the agent of defendant; that such application and survey, if any such there be, has at all times been, and now is, in possession of defendant, and plaintiff has never seen the same.

Plaintiff denies that said Oldham by said application, or in any manner, stated, agreed, covenanted, and warranted that the property insured by said policy was at the date of said application and survey mortgaged to the amount of twenty thousand dollars and no more, but alleges that at the date of writing said policy, and only then, the said agent made enquiry of said Oldham as to the amount of the mortgages on the property insured; that said Oldham informed said agent of all the facts concerning the mortgages on said premises, and upon a calculation made by said Oldham and said agent, it was ascertained that the debts secured by the mortgages on said premises amounted, in principal and interest, to about twenty-three thousand two hundred dollars,

($23,200.00;) that upon enquiry by said agent, he was informed by said Oldham that other property was covered by said encumbrances, and that said other property was of the value of from three to four thousand dollars; that said other property was the building and grounds occupied by said Oldham as a family residence, whereupon the agent de-
50 ducted the sum of thirty-two hundred dollars from the total of the encumbrances on said property insured, and agreed with the said Oldham that the amount of the encumbrances on the property insured should be put at the sum of twenty thousand dollars, ($20,000.00,) which was done, and so done by said agent in the application so prepared and filled out by him, with full knowledge of all said facts.

Plaintiff alleges that at said date the dwelling-house, and land upon which the same is situated, which were used by said Oldham as a residence, were included in and covered by the encumbrances set forth in defendant's answer, and were then reasonably worth thirty-five hundred dollars, ($3,500.00;) that the said Oldham signed the application so prepared and filled out by said agent, at said agent's request, relying upon the fact that the same set forth truly the statements made by the said Oldham.

For reply to the third defense in defendant's answer, plaintiff denies that before the execution and delivery of the policy sued on herein, and for the purpose of obtaining the same, the said Oldham did make, sign, and deliver to defendant a written application for insurance upon the property described in the petition herein, but alleges that said application, if any such there be, was made by defendant's agent, and if
51 signed by said Oldham, was so signed at the request of said agent, and denies that at said time, or at any time, said Oldham made any false, untrue, or erroneous statements or representations as to the cash-value of said buildings, exclusive of land and water-power, or that said statements were falsely and fraudulently made to induce defendant to execute and deliver said policy to said Oldham; but alleges the fact to be that the agent of said defendant, who was then a resident of the city of Kansas, and well informed as to the value of real estate in said city, made at the date of said pretended application a thorough and careful inspection of the buildings aforesaid, and the mill-gearing and machinery therein contained, and upon such inspection and survey, and upon learning that other insurance companies had valued the building at fifteen thousand dollars, ($15,000.00,) and the machinery at fifteen thousand dollas, ($15,000.00,) so estimated the same himself, and wrote the policy aforesaid upon such estimate made by himself; and plaintiff alleges that the said building was at said date of the value of fifteen thousand dollars, ($15,000.00.)

Plaintiff denies that said Oldham made any application for insurance on the mill machinery and gearing aforesaid, but alleges that said application, if any such there be, was made by defendant's agent,
52 and if signed by said Oldham was so signed at the request of said agent.

Plaintiff denies that said Oldham made any false, untrue, or erroneous representations as to the value of said machinery, and alleges that said machinery was at said date of the value of fifteen thousand dollars, ($15,000.00;) that the agent of said defendant was a person of large experience in the insurance business, and made a careful inspection and survey of said machinery before said policy was written and at the time of writing the same, and himself estimated the machinery and mill-gearing covered by said policy at the sum of fifteen thousand dollars, ($15,000.00.)

Plaintiff denies that said Oldham at the dates mentioned in said answer, or at any time, made any false, untrue, or erroneous representations as to the amount of encumbrances on the property covered by said policy, but alleges that said Oldham gave said agent the total amount of the encumbrances thereon, and that upon enquiry by said agent as to whether the encumbrances covered any other property than the property insured, he was informed by said Oldham that the encumbrances included also the dwelling and grounds occupied by him, said Oldham, as a residence, which dwelling and grounds were then of the value of from three to four thousand dollars; that thereupon the agent
53 agreed with said Oldham that the value of said dwelling and grounds should be deducted from the total of the encumbrances, which total was determined by said agent to be about twenty-three thousand and two hundred dollars, ($23,200.00;) that said agent did then deduct from said total the sum of thirty-two hundred dollars, ($3,200.00,) and agreed with said Oldham that the amount of encumbrances on the property insured should be put at twenty thousand dollarsf ($20,000.00,) which was done and so done at the request of said agent; that said dwelling-house and grounds were then included in said encumbrances, and were worth at the time thirty-five hundred dollars, ($3,500.00.)

For reply to the fourth count in defendant's answer, plaintiff alleges that at the time said policy was written and delivered to said Oldham, and for some years prior thereto, and thereafter until the date of the fire by which said buildings were destroyed, the said building, fixed and movable machinery, belting and engine were occupied by said Oldham as a flour and grist mill; that at the time said policy was delivered said mill was not being run, for the reason that there was no grain in the country, and the mill was necessarily idle, having no grain therein to be ground, which fact was well known to defendant's agent
54 when he delivered the policy; that at sundry times thereafter and at the date of the fire the mill was necessarily idle for want of grain to be ground, all of which was well known at the said times to defendant's agent, but plaintiff alleges that the property covered by said policy was at all times occupied by said Oldham as a flour and grist mill.

For reply to the fifth count in the defendant's answer, plaintiff denies that on the 10th day of January, A. D. 1873, or at any time, said Oldham did attempt any fraud on defendant, and denies that for the purpose of cheating and defrauding defendant, or for any purpose or in any manner, the said Oldham attempted any fraud on defendant, but alleges that on said date the said Oldham did comply with the requirements and conditions of said policy, and did render to defendant an accurate account of his loss and damage by fire of the property described in said policy, and that the account so rendered was a correct and true account of his loss and damages, and that the property described therein was at the times stated of the values given in said account; denies that said Oldham knew the value of the building to be only five thousand
55 dollars, ($5,000.00,) and the value of the machinery, mill-gearing, belting, and engine, to be only five thousand dollars, ($5,000.00,) but alleges that said Oldham placed the values on said property as given in said account and proof of loss in good faith and according to the best of his judgment.

LAY AND BELCH,
J. K. CRAVENS,
TOMLINSON & ROSS,
Att'ys for Pl'ff.

And afterward, at the April term, 1874, of the circuit court of the United States, and on the 25th day of April, 1874, the following proceeding' were had, to wit:

Continuance.

THE FIRST NATIONAL BANK OF KANSAS CITY
vs.
THE HARTFORD INS. CO. } No. 198.

It is ordered by the court that this cause be continued until the next term thereof.

And afterward, at the November term, 1874, of the said circuit court of the United States, and on the 20th day of November, 1874, the following proceedings were had, to wit:

56 *Case set for trial.*

THE 1ST NATIONAL BANK, KANSAS CITY,
vs.
THE HARTFORD INSURANCE CO. } No. 198.

It is ordered by the court that this cause be set specially for the first day of the next term, and cause continued.

And afterward, at the April term, 1875, of said circuit court of the United States for the western district of Missouri, and on the 19th day of April, 1875, being the first day of said term, the following proceedings were had, to wit:

Case called for trial, jury waived, heard in part.

FIRST NATIONAL BANK OF KANSAS CITY
vs.
THE HARTFORD INSURANCE CO. } No. 198.

This day comes the plaintiff, by Mess'rs Lay and Cravens, and the defendant, by Mess'rs Gage and Ladd, and the case being regularly called for trial, and an agreement of counsel to waive a jury having been this day filed, the evidence was thereupon in part heard, but not concluded at the hour of adjournment; and it was ordered that further proceedings be continued until to-morrow morning.

The waiver for jury filed is in words and figures following, to wit:

57 *Jury waived.*

In the circuit court of the United States for the western district of Missouri.

THE FIRST NATIONAL BANK OF KANSAS CITY
vs.
THE HARTFORD INSURANCE COMPANY.

The said parties, by their attorneys, hereby waive a jury, and submit this cause for trial before the court.

JOHN K. CRAVENS &
LAY & BELCH,
Att'ys for Pl'ff.
GAGE & LADD,
Att'ys for Defendant.

And afterward, at said April term of said circuit court of the United States, and on the 20th day of April, 1875, the following further proceedings were had, to wit:

Case further heard, argued by counsel, & submitted.

FIRST NATIONAL BANK OF KANSAS CITY
vs.
HARTFORD INSURANCE COMPANY. } 198.

This day come again the parties, by their attorneys, as on yesterday, and thereupon the evidence was further heard, and the case was argued by counsel and submitted to the court on the pleadings and proofs
58 and was by the court taken under advisement.

And afterward, at said April term of said circuit court of the United States, and on the 24th day of April, 1875, the following further proceedings were had, to wit:

Finding for def't.—Special finding of facts filed.—Judgment.—Motion for new trial filed and overruled.

FIRST NATIONAL BANK OF KANSAS CITY
vs.
HARTFORD FIRE-INSURANCE CO. } No. 198.

This day come the parties, by their respective attorneys, and the cause having been heretofore tried by the court, sitting as a jury, and having been argued by counsel, and submitted on consideration whereof, and the court being fully advised in the premises, the court finds for the defendant on the issues joined herein, and returns a special finding of the facts herein, which is ordered to be filed and made a part of the records in this case. It is, therefore, now considered by the court that the plaintiff, The First National Bank of Kansas City, take nothing by its writ herein; that the defendant, The Hartford Fire-Insurance Company, go hence without day and recover against the plaintiff its costs and charges expended herein; and thereupon the plaintiff files a motion for new trial, which having been considered by the court, it is ordered that the same be overruled.

59 The special finding of the court is in words and figures following, to wit:

Special finding.

THE FIRST NATIONAL BANK OF KANSAS CITY, Missouri,
vs.
THE HARTFORD INSURANCE CO.

Under the stipulation waiving a jury filed by the parties to this cause, the court, from the evidence, makes the following special findings of fact and conclusion of law thereon:

1. On the 11th day of November, 1872, the defendant made and issued its contract of insurance, the policy sued upon, in words and figures as follows, (see page 22:)

2. The application referred to in said policy and the answers of the assured is in words and figures as follows, (see page 19:) The 20th question in said application was as follows: "20. What is the cash value of the buildings, aside from hand and water power? What is the cash value of the machinery, and also of the stock in the same?" The answer made by the applicant, W. D. Oldham, to said question was "$15,000, building; $15,000, machinery."

3. At the date of the application and issuing the policy, and at the date of the destruction of the property by fire on December 7th,
60 1872, the mill-building therein described and insured was, exclusive of hand and water power, of the cash value of $8,000, and no more, and the machinery therein, insured in the policy on the same dates, was of the cash value of $12,000, and no more. The answers made by the assured to the questions contained in the application were made by him in good faith, without any intention on his part to commit any fraud on the defendant.

4. Upon all the facts in issue, except as to valuation of the property insured at the date of its insurance, the court finds for the plaintiff.

Conclusion of law.

Under the provisions of the policy and application made part thereof, the court finds as a conclusion of law that the answers of the assured as to the value of the property insured defeat the right to recover on the policy, and accordingly orders judgment for the defendant; to which the plaintiff duly excepted.

JOHN F. DILLON,
Circuit Judge.

61 The motion for a new trial filed by plaintiff is in words and figures following, to wit:

Motion for new trial.

THE FIRST NATIONAL BANK OF KANSAS CITY, Missouri,
vs.
THE HARTFORD INSURANCE CO.

The plaintiff moves the court to set aside its verdict on the special findings by it made, and to grant plaintiff a new trial, because said verdict on the facts found is contrary to law.

JOHN K. CRAVENS,
Att'y for Plaintiff.

And afterwards, at the said April term, 1875, of the said circuit court of the United States, and on the 28th day of April, 1875, the following further proceedings were had, to wit:

Writ of error allowed & citation signed.—Bond approved.

FIRST NATIONAL BANK OF KANSAS CITY
vs.
HARTFORD FIRE-INSURANCE COMPANY. } 198.

This day comes the plaintiff, by its attorney, A. M. Lay, esq., and presents to the court a writ of error herein to reverse the judgment in

favor of the defendant; also a citation directed to said defendant admonishing it to be and appear before the Supreme Court at the
62 next term thereof, and bond as required by law. And thereupon said writ of error is allowed, citation signed by the presiding judge, and the bond presented and approved, and ordered to be filed and made a part of the record herein.

The bond filed is in words *in* figures following, to wit:

Bond of appeal.

THE FIRST NATIONAL BANK OF KANSAS CITY, Missouri,
vs.
THE HARTFORD INSURANCE CO.

Know all men by these presents that The First National Bank of Kansas City, Missouri, as principal, and Howard M. Holden and Edward H. Allen, as sureties, are held and firmly bound unto The Hartford Insurance Company in the sum of five hundred dollars, signed and sealed with our seals this 23d day of April, 1875.

The condition of this obligation is such, that whereas the above-bounden The First National Bank of Kansas City, Missouri, is about to sue out a writ of error to the judgment of the circuit court of the United States for the western district of Missouri in the above-entitled cause:

Now, if the said plaintiff in error shall prosecute its writ to
63 effect, and if it fail to make its plea good shall answer all damages and costs which may be adjudged against it, then this bond shall be void.

THE FIRST NATIONAL BANK OF KANSAS CITY.
By H. M. HOLDEN, *President.* [L. S.]
HOWARD M. HOLDEN. [SEAL.]
EDWARD H. ALLEN. [SEAL.]

Approved April 28th, 1875.

JOHN F. DILLON, *Judge.*

64

65 UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, Henry C. Geisberg, clerk of the circuit court of the United States for the western district of Missouri, do hereby certify that the writing hereto annexed is a true transcript of the record and proceedings in case No. 198 of First National Bank of Kansas City, Missouri, against The Hartford Fire-Insurance Company, of Hartford, Connecticut, as fully as the same remain on file and of record in said case in this office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of Jefferson, in said district, this 3d day of September, A. D. 1875.

[SEAL.] H. C. GEISBERG, *Clerk.*

66 In the Supreme Court of the United States, on writ of error to the circuit court of the United States for the western district of Missouri.

THE FIRST NATIONAL BANK OF KANSAS CITY, Missouri, plaintiff in er.,
vs.
THE HARTFORD FIRE-INSURANCE COMPANY, of Hartford, Connecticut, d. in e.

The First National Bank of Kansas City, Missouri, plaintiff in error, complains of the record of the proceedings in the court below in the above-entitled cause, and says there is manifest error therein.

First. The court below erred in its conclusion of law upon the facts found by it.

Second. The judgment of the court below is contrary to law.

Third. The judgment of the court below is contrary to the facts found by it.

Fourth. The court below erred in overruling plaintiff's motion for a new trial.

NELSON COBB,
Att'y for Pl'ff in Error.

67 In Supreme Court of United States.

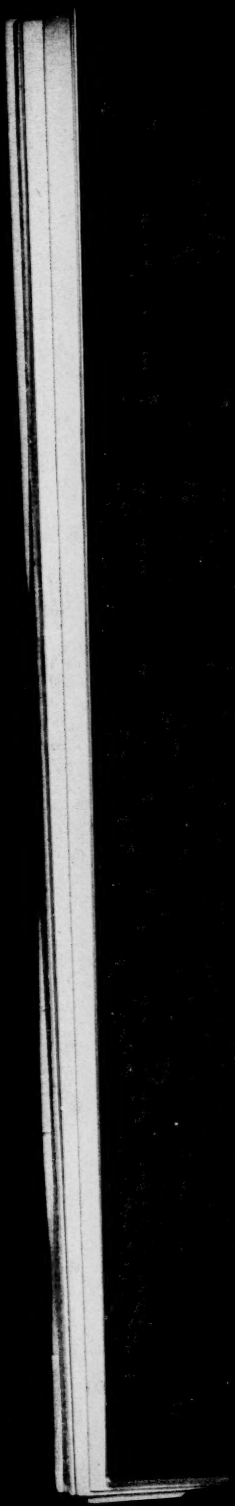
FIRST NATIONAL BANK, KANSAS CITY, PL'FF in error,
vs.
THE HARTFORD FIRE-INSURANCE COMPANY.
No. 650.

5th. The plaintiff prays a reversal of the judgment in said cause.

VEDANTUS B. EDWARDS,
Counsel Pl'ff in Error.

(Indorsed:) No. 650. 1875, October term. Supreme Court United States. First National Bank Kansas City, plaintiffs in error, vs. The Hartford Fire-Ins. Co. Prayer for reversal. Filed 6 November, 1875. Vedantus B. Edwards, counsel pl'ffs in error.

(Indorsement on cover:) No. 167. The First National Bank of Kansas City, plaintiff in error, vs. The Hartford Fire-Insurance Company. W. Missouri C. C. U. S. Filed 7th October, 1875.



SUPREME COURT OF THE UNITED STATES

No. 167.

THE FIRST NATIONAL BANK OF KANSAS CITY,
PLAINTIFF IN ERROR,

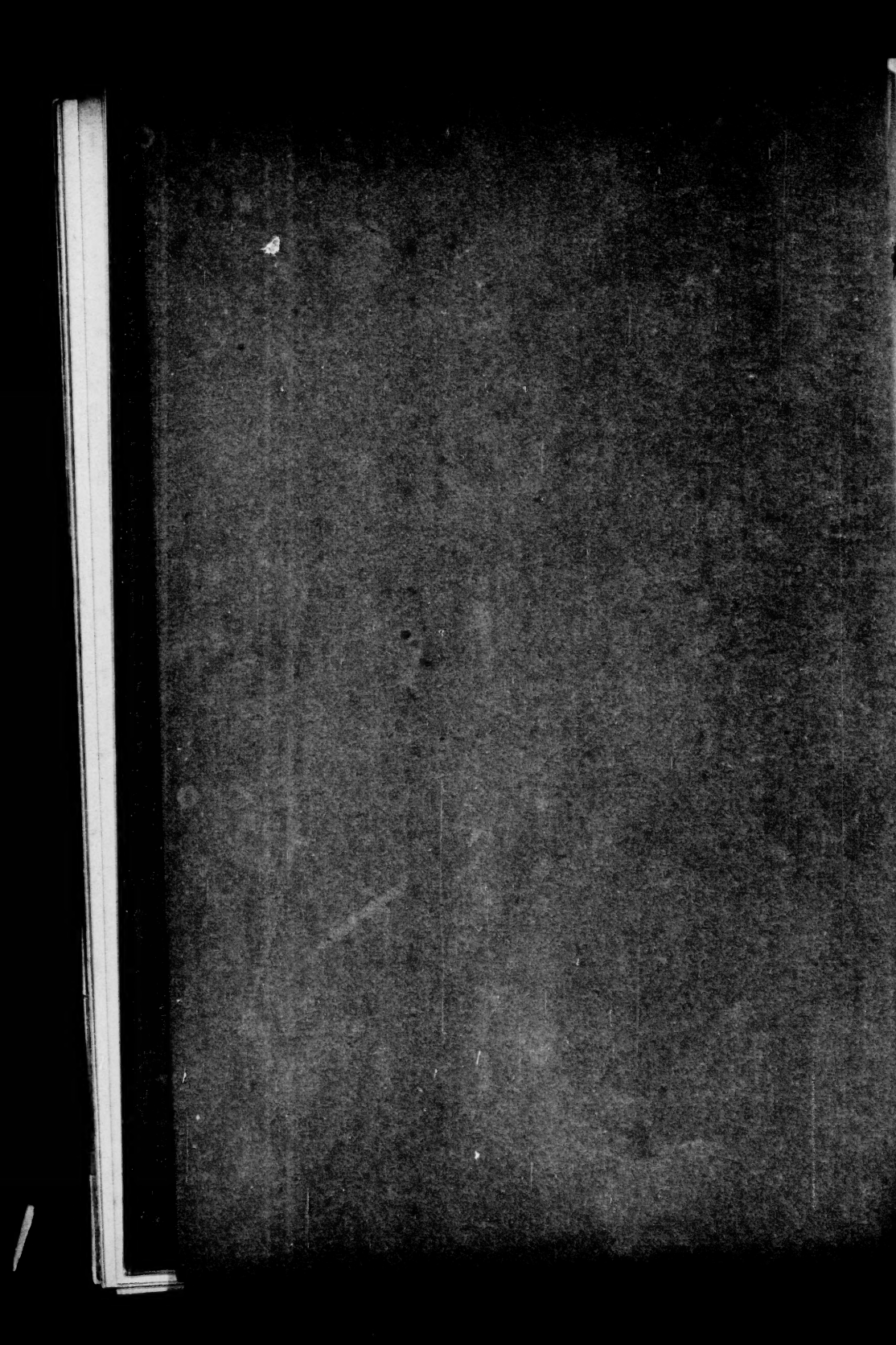
vs.

THE HARTFORD FIRE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF, ASSIGNMENT OF ERRORS AND ARGUMENT FOR PLAINTIFF IN ERROR.

JOHN K. CRAVENS,
Counsel for Plaintiff in Error.



In the Supreme Court of the United States.

THE FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI,
Plaintiff in Error,

vs.

THE HARTFORD FIRE INSURANCE CO.,
Defendant in Error.

STATEMENT.

This is an action upon a policy of fire insurance issued by the defendant in error to one W. D. Oldham, upon certain mill property, containing a clause, "Loss, if any, payable to First National Bank of Kansas City, Mo.," the plaintiff in error.

The answer of defendant set up several matters of defense, all of which, except that of warranty and breach thereof hereinafter quoted, were found against the defendant by the special findings of the court below. So much of the second defense as presents the question raised, is as follows:

"2. And for further answer and defense the de-
"fendant states that said policy of insurance was
"made by the defendant and accepted by said Old-
"ham upon the express condition that if any applica-
"tion, survey, plan, or description, of the property

" therein insured was referred to in said policy, such " application, survey, plan, or description, should be " considered a part of said policy and a warranty by " said Oldham.

" That the said W. D. Oldham, before the execu- " tion or delivery of the policy of insurance sued on, " and for the purpose of obtaining the same, did " make, sign and deliver to the defendant a written " and printed survey and application for insurance " upon the property mentioned in the petition, which " said application and survey was dated the 11th day " of November, A. D. 1872, and was particularly re- " ferred to in said policy by a certain writing upon the " face thereof, in the following words and figures, to- " wit: ' Special reference being had to assured's ap- " plication and survey, No. 1462, on file, which is " his warranty and a part hereof.'

" That in and by said application and survey so " made and signed by said Oldham, and in pursuance " of which said policy was executed and delivered to " him by the defendant, the said Oldham stated, " agreed, covenanted, and warranted that the cash " value of the buildings insured by said policy, aside " from hand and water power, was at the date of said " application and survey, fifteen thousand dollars.

" And the defendant alleges that said statement " and warranty so made by said Oldham as to the val- " ue of said buildings, was false and untrue; that the " cash value of said buildings was not, at the date of " said application and survey, and has not at any time " since said date been greater than five thousand " dollars.

" That in and by said application and survey so " made and signed by said Oldham, and in pursuance " of which said policy was executed and delivered to " him by the defendant, the said Oldham stated, cov- " enanted, and agreed and warranted that the cash " value of the machinery in said buildings was, at the " date of said application and survey, fifteen thousand " dollars.

" And the defendant alleges that said statement " and warranty so made by said Oldham as to the " value of said machinery was false and untrue; that " the cash value of said machinery was not, at the " date of said application and survey, nor has the " same at any time since said date been greater than " five thousand dollars." (p. r. 14.)

The matter of defense thus set up was traversed by the reply.

A stipulation waiving a jury was filed, and upon the trial the court made special findings and conclusion of law as follows:

SPECIAL FINDING.

" Under the stipulation waiving a jury filed by " the parties to this cause, the court, from the evi- " dence, makes the following special findings of fact " and conclusion of law thereon:

" I. On the 11th day of November, 1872, the " defendant made and issued its contract of insurance, " the policy sued upon, in words and figures as fol- " lows: (p. r. 10.)

" II. The application referred to in said policy " and the answers of the assured, is in words and " figures as follows, (p. r. 7:) The 20th question in " said application was as follows: ' 20. What is the " cash value of the buildings, aside from hand and wa- " ter power? What is the cash value of the ma- " chinery, and also of the stock in same?' The answer " made by the applicant, W. D. Oldham, to said " question, was, '$15,000, building; $15,000, ma- " chinery.'

" III. At the date of the application and issuing " the policy, and at the date of the destruction of the " property by fire on December 7th, 1872, the mill- " building therein described and insured was, exclusive " of hand and water power, of the cash value of $8,000,

" and no more, and the machinery therein, insured in " the policy, on the same dates, was of the cash value " of $12,000, and no more. The answers made by " the assured to the questions contained in the appli- " cation were made by him in good faith, without any " intention on his part to commit any fraud on the " defendant.

" IV. Upon all the facts in issue, except as to val- " uation of the property insured at the date of its in- " surance, the court finds for the plaintiff."

CONCLUSION OF LAW.

" Under the provisions of the policy and appli- " cation made part thereof, the court finds as a conclu- " sion of law that the answers of the assured as to the " value of the property insured defeat the right to re- " cover on the policy, and accordingly orders judg- " ment for the defendant; to which the plaintiff duly " excepted." (p. r. 24.) By the judgment of the court, the special findings were made part of the record in the case. (p. r. 24.)

The policy contains a provision as follows: "If " an application, survey, plan, or description of the " property herein insured is referred to in this policy, " such application, survey, plan or description shall " be considered a part of this policy and a warranty " by the assured; and if the assured in a written or " verbal application makes any erroneous representa- " tion, or omits to make known any fact material to " the risk * * * * then, and in every such case, " this policy shall be void," (p. r. 11.) The application and survey of the assured, Oldham, was specially referred to by the policy as follows: " Special ref- " erence being had to assured's application and sur- " vey No. 1462 on file, which is his warranty, and a " part hereof," (p. r. 10.)

The application was made upon a printed form furnished by the defendant and begun:

"*Hartford Fire Insurance Company.*
Survey of Phœnix Mills.

"The estimated value of personal property and "of each building to be insured, and the sum to be "insured on each, must be stated separately. When "personal property is situated in two or more build- "ings, the value and amount to be insured on each "must be stated separately. When insurance is "wanted on personal property, the same description "should be given of the building containing the prop- "erty as if insurance is wanted on the building.

"Application of W. D. Oldham of Kansas City, "Mo., for insurance against loss or damage by fire, "by the Hartford Fire Insurance Co., in the sum of "twenty-five hundred dollars, on the property speci- "fied, the value of the property being estimated by "the applicant

	Sum to be insured.	Valuation.
"On buildings	$1,250.	$15,000
"On machinery, fixed and moveable, in- "cluding engine	$1,250.	$15,000

"The applicant will answer the following questions, "and sign the same, as a description of the premises "on which the insurance will be predicated." Then follow twenty-two questions, the twentieth of which and the answer thereto are set out in the second special finding of the court. Below all questions and answers, and preceding the signature of the applicant is the following:

"And the said applicant hereby covenants and "agrees to and with said company that the foregoing "is a just, full, and true exposition of all the facts and "circumstances in regard to the condition, situation, "value, and risk of the property to be insured, so far "as the same are known to the applicant and are ma-

" terial to the risk." (p. r. 7—10.) The court is respectfully referred to the certified record for a more exact representation of the original application than is shown by the printed record, the copy there being made upon one of the blanks furnished by the company.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns the following errors in the record, upon which it relies for a reversal of the judgment of the court below:

First—The court below erred in its conclusion of law upon the facts found by it.

Second---The judgment of the court below is contrary to law.

Third---The judgment of the court below is contrary to the facts found by it.

ARGUMENT.

The record in this case presents but two questions for consideration:

I. Do the application and survey made by the assured, and the policy of insurance issued thereon by the company, when taken together as one contract, constitute the answer of the assured as to the value of the mill building and machinery, an express warranty as to the truth of that answer?

II. If it was the intention of the assured and the company to make the answer of the assured as to such value an express warranty, can the value of the subject of insurance be made the subject of express warranty?

The purpose of construction is to ascertain and give effect to the intention of the parties according to the sense in which they mutually understood the contract at the time it was made, for it is the intention which must prevail, and greater regard will

be had to it than to the words which may have been used to express it. The natural and ordinary meaning of the words used by the contracting parties, the law conclusively holds to be the intention of the parties, and where both parties have spoken the words used by each must be resorted to in order to ascertain the meaning of the whole. Hence the rule that where a written contract consists of parts or counterparts, upon different papers, all such parts and papers must be looked into to discover the intention of the parties. The case at bar forcibly illustrates the rule, for if there be a warranty by the assured, as claimed by the ininsurer, the extent of that warranty can only be ascertained by considering both the application and the policy.

When in drawing a contract in writing words are used by either party he will be held to have used them in that sense in which he had at the time reason to believe they were understood by the other party; and where words are furnished by one party for the use of the other, the party furnishing the words will be held to the sense in which he had at the time reason to believe they were used or accepted by the other party.

A blank form of application, prepared by the insurer was placed in the hands of the insured, to be by him filled. The instrument asserts at the outset that it is a survey of certain property, it then gives direction to the applicant as to how he shall fill the immediately succeeding blanks which relate exclusively to values, but he is not informed as to the effect which will be given to the estimates he shall make. Then follows a direction given by the insurer to the insured as to how he shall answer the succeeding questions; "the applicant will answer the following questions, and sign the same, *as a description of the premises on which the insurance will be predicated*;" thus explicitly informing the applicant that the insurance will be predicated upon his answers as a description only, of

the premises to be insured. As estimate of value is not matter of description, the assured cannot be held to have understood from the direction given him that insurance would be predicated upon his answer to the twentieth question, which relates exclusively to values. After he had answered all the questions propounded to him, the applicant as a final interpretation of what he had done, and in language furnished him by the insurer, " covenants and agrees to and with said company, that the foregoing is a just, full and true exposition of all the *facts and circumstances*, in regard to the condition, situation, value and risk of the property to be insured, *so far as the same* are known to the applicant and *are material to the risk*." The natural and ordinary meaning of what the company asked the applicant to covenant, and what the applicant did covenant is, "I covenant and agree that my answers to the questions which you have asked, to the best of my knowledge, contain a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and risk of the Phœnix Mill property, so far as those facts and circumstances are material to the risk which the company will assume by writing a policy of insurance against fire upon it for the sum of $2,500." This was what the assured said to the company; and when the policy was delivered by the company to the assured it conveyed to him no other meaning than that which he had understood from the language which the company had placed in his mouth by the application. The policy told him that it was issued with special reference to his application and survey, which was on file by the company, which is his warranty, and is made part of the policy. Making the application a warranty and a part of the policy did not change the meaning of any word contained in it; did not enlarge or contract the construction which should be placed upon it; nor did it change the legal effect of it. The applicant had already *covenanted* and agreed by it, and naming it a warranty

made neither more nor less of it than a covenant containing its own limitation. The policy also informed the assured that if in his application he had made any erroneous representation, or had omitted to make known *any fact material to the risk* the policy would be void; thus limiting as he had limited his covenant to those representations and facts stated, which were material to the risk: that is to such representations, facts and circumstances as related to "a description of the premises," for the company had informed him that upon these "the insurance will be predicated." If the company had then intended to predicate the insurance upon the applicant's estimate of the value of the property it should have said so in terms which would not ensnare him.

The conclusion reached is sustained by the standard text writers, and by the adjudicated cases.

"Any statement or stipulation upon the literal truth or fulfilment of which depends the validity of the contract, whether appearing as a condition or warranted, or however otherwise, amounts to a warranty. But no particular form of words will make a statement or stipulation a warranty, where it is apparent that it is not the intention of the parties to make the validity of the contract depend on the literal truth or fulfilment of the statement or stipulation. Nor will all the statements made in an application which, by reference, becomes part of the policy, or by agreement, is to have the force and effect of a warranty, therefore necessarily become warranties, since some other clause in the policy may qualify the reference." May on Ins. § 156. So the qualification and limitation may be in some clause of the application itself.

"So, although the application be expressly made a part of the policy, its statements will not be regarded as warranties if qualified by other stipulations which afford a fair inference that the parties themselves did not so intend them. The by-laws of a mu-

tual company may provide that the application shall be a part of the policy 'and a warranty on the part of the insured,' and that 'the policy shall be void unless the applicant shall make a correct description and statement of all facts inquired for in the application, and also all other facts material in reference to the insurance, or to the risk,' yet, if in the application it is agreed that it is 'a correct description of the property so far as regards the condition, situation, value, and risk on the same,' and that 'the misrepresentation or suppression of material facts' shall destroy the applicant's claim for damages, these latter stipulations, when construed together with the former, being not only unnecessary, if the assured is to be held to the literal and exact truth of his answers, but inconsistent with holding them to be strict warranties, reduce the answers to the quality of representations." May on Ins. § 160. Citing *Elliot vs. Hamilton Mut. Ins. Co.* 13 Gray (Mass.) 139. See also as elucidating the distinction here made May on Ins. §§ 164, 168, 169.

In the case of *Fitch vs. American Popular Life Ins. Co.*, 59 N. Y. 557, the defendant alleged a warranty and breaches thereof, to avoid liability on the policy. The application made by the assured for the policy was upon a blank furnished by the company, which contained numerous explanations, directions and instructions, followed by a series of questions, and closing with what the defendant contended was an express warranty as to the truth of the answers made by the applicant. The court in pronouncing its opinion by RAPALLO J. said; "The first question to be considered is whether the statements contained in the application were absolute warranties or mere representations, and whether under the terms of the policy and application, the warranty therein mentioned was not, in effect, simply that the statements were made in good faith. Although the term warranty is used in both instruments, it must be construed with refer-

ence to the other language employed in the same instrument. These instruments were prepared by the defendant, and themselves explained the degree of responsibility to be assumed by the applicant in answering the questions propounded to him. Although the word warranty is employed, yet, if the explanations accompanying that term show that a strict warranty was not intended, these explanations given by the defendant itself in the papers, and which induced the applicant to undertake to answer the questions and enter into the contract, must govern." After pointing out many of the particular phrases of the application the court proceeds.

"This document which the applicant is required to sign, concludes with a declaration that his answers to the questions and the written statements in the preceding statement, declaration or *warranty*, together with the statement made to the examining physician and signed, are *warranties* correct and true, and that there is not concealed, withheld or unmentioned therein any circumstance in relation to the past or present state of the health, habits of life, conditions or intentions of the applicant, nor any fact concerning his relatives or ancestry with which the company ought to be made acquainted; also that the statements, etc., shall be the basis and form part of the contract or policy, and if not in all respects true and correct the policy shall be void."

"This application was signed by Fitch * * * and a policy was thereupon issued on his life in favor of the plaintiff as assured for $3000. This policy contains a declaration on the part of the company that it is issued in entire unconditional honest good faith and with the just intent of scrupulously fulfilling all the conditions and engagements of the contract with absolute certainity, and then proceeds to state that fraud or intentional misrepresentation violates the policy, and that the statements and declarations made in the application are warranties, and in all respects true, and

do not suppress or omit any fact relative to the insured affecting the interests of the company or which whether material or not, would tend to influence the Company in taking the risk." "The true construction of the papers is that the policy is to be void only in case of intentional and fraudulent misrepresentation or suppression of facts by the applicant, and that although the term warranty is used, yet its legal effect is so modified by the explanations and declarations by which it is accompanied, that it imports no more than an assurance that the statements are made honestly, in good faith, and are believed by the applicant to be correct and true. These explanations and declarations are so inconsistent with the legal effect of a warranty, in the strict legal sense of that term, that both cannot stand together, and to hold the applicant to the strict rules applicable to warranties, would be to entrap him into an agreement which he never intended to make."

In the case *Germania Fire Ins. Co. vs. Casteel*, decided by the Supreme Court of Illinois on June 22, 1877, syllabus in Chicago Legal News Vol. IX., page 374, the court said; "It is provided by one of the clauses of the policy that 'any over valuation of the property insured shall render the policy void.' Appellee by his application for the policy, which by its terms, is made 'a condition of the insurance and a warranty on the part of the insured' valued the property at $750, and obtained a policy, according to appellant's practice in that respect for two thirds of the estimated value. Evidence was given on behalf of appellant tending to prove that this valuation was excessive and fraudulent, and upon this it is contended the jury should have found for appellant. It is not to be controverted that if the valuation was clearly so excessive and inaccurate as not to be accounted for upon the hypothesis that it is merely the result of the general disposition natural in property owners to put a favorable estimate on their property it is such a fraud

as avoids the policy; but on the contrary, if although excessive the valuation may be reasonably accounted for on that hypothesis, it will not affect the policy." The court in the last case seems to have utterly ignored the provision in the policy that made the application a part of it, and a warranty by the assured. This was doubtless upon the theory that if there was any warranty as to value it was affirmative. An affirmative warranty is a covenant that a certain fact then exists, and it must be literally and exactly true, or the policy never takes effect, never becomes operative. A warranty may be broken by being overfull as effectually as by being underfull; the fulfilment can be neither greater nor less; it requires exactly one pound of flesh, but no drop of blood. There can be no warranty unless the subject of it be subject to exact and literal demonstration and be capable of exact and literal performance. Warranty can only be predicated upon *fact*, it can never repose upon opinion. Facts are substantial, opinion is fluctuating. The same person at different times, will entertain different opinions about the same fact. Value is not a fact, it is matter of opinion, and the same man about a piece of property which he owns will place one value to-day and another to-morrow; often the result of mere fancy. Value is a matter too fluctuating, too restless to become the subject of warranty. In the case at bar the applicant did not undertake, or covenent that he had given the value correctly, but only that he had given "a just, full and true exposition of all the facts and circumstances in regard to the value, of the property to be insured, so far as the same were known to him, and were material to the risk," and the defense does not question the truth of any fact or circumstance stated by him.

The opinion of this court as delivered by Mr. Justice HUNT, in *Franklin Ins. Co. vs. Vaughan* 92 U. S. 516 is so peculiarly pertinent to the present case that the court will excuse a quotation from it. "A

defense was also sought to be made on the ground of the over valuation of the goods by Vaughan when he obtained the insurance. The policy was preceded by an application in this form:

'Application of James L. Vaughan for insurance &c., in the sum of $6000, on the property specified: the value of the property being estimated by the applicant.

Valuation.	Sum to be Insured.	Rate.
On Stock, &c., $12,000.	$6,000.	3-10 of 2 per cent.'

Which statement was signed by Vaughan, and agreed to be true, so far as it was known to him, and so far as it was material to the risk. This was on the 23d of March, 1873. The fire occurred on the fifth of May, 1873.

"The sale of goods after the purchase, and before the fire, amounted to the sum of $653. The jury found the goods which were actully destroyed to have been worth $7,204. These two sums show the value of the goods; to wit, $7,857.

"The value of the goods was to be estimated by the applicant. He gave this estimate at $12,000; and there is not the slightest evidence that such was not his honest estimate of their value. Insurance agents, as well as other persons, know with what partiality most men estimate their property, and how much more valuable they esteem it when their own than when it is their neighbor's. They do not object to this principle when the premiums are received for issuing policies. It is only when losses occur that they seek to apply the more rigid test of actual value."

"The counsel for the plaintiff in error, in his brief, concedes that it is not every over valuation which will avoid a policy; but he objects to the charge of the judge, that to produce this result, the over-valuation must be 'grossly enormously' in excess of the truth. It is hardly just to the judge holding the circuit, or to the claimant, that the charge should rest

upon this statement. The judge undoubtedly said, 'If the valuation was grossly enormously in excess of the value of the goods, then the burden is cast on the plaintiff of showing that he acted honestly and in good faith in making the valuation, and that it was not made for any fraudulent purpose or with any fraudulent intention, but was an honest and unintentional error.' He did not, however, say that nothing less than this would have that effect. He said also, 'The law exacts the utmost good faith in contracts of insurance, both on the part of the insured and the insurer; and a knowing and wilful over-valuation of the property by the insured, with a view and purpose of obtaining insurance thereon for a greater sum than could otherwise be obtained, is a fraud upon the insurance company that avoids the policy. * * * It is a question of good faith and honest intention on the part of the assured; and though he may have put a value on his property greatly in excess of its cash value in the market, yet if he did so in the honest belief that the property was worth the valuation put upon it, and the excessive valuation was made in good faith, and not intended to mislead or defraud the insurance company, then such over-valuation is not a fraudulent over-valuation that will defeat a recovery," and the judgment of the court below was approved.

In the special findings the court below in the case at bar found, "The answers made by the assured to the questions contained in the application were made by him in good faith, without any intention on his part to commit any fraud on the defendant." An over-valuation, intentionally and fraudulently made, will defeat the recovery whether there be any stipulation to that effect in the policy or not; but to defeat the recovery the over-valuation must in either case be so clear that it is obvious at a glance, and cannot be accounted for upon the hypothesis that every man is prone to put a favorable estimate on his own.

It was said by Chief Justice MARSHALL in *Yeaton vs. Fry* 5 Cranch 342, "Policies of insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally construed, in order to effect the real intention of the parties, if that intention can be clearly ascertained." In the case at bar the defendant insists upon a strained and unnatural construction of the contract of insurance, in order that a forfeiture may protect it from a liability on its policy. If there were any doubt upon which the company could rest the construction claimed by it, it would there be met by the rule that conditions providing for disabilities and forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced. This rule has peculiar force in cases like the present, where all the obligatory language was phrased by the company, and where it is now attempting to seize upon its own words introduced only as a safeguard against fraud, and make them available to defeat the claim of the assured on the theory of a technical forfeiture where there is no fraud. If this contract of insurance taken as a whole admits of such a construction, it is due to the dexterity of the draftsman, and not to a meeting of the minds of the parties.

JOHN K. CRAVENS,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

NO. 1571

THE FIRST NATIONAL BANK OF KANSAS CITY,
PLAINTIFF IN ERROR,

vs.

THE HARTFORD FIRE INSURANCE COMPANY, DE-
FENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF MISSOURI.

STATEMENT OF CASE AND ARGUMENT FOR DEFENDANT IN ERROR.

JOHN D. GARR,
Atty for Defendant in Error.

Thomas & Wilkerson, Printers and Binders, Kansas City, Mo.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE FIRST NATIONAL BANK OF KANSAS CITY, PLAINTIFF IN ERROR,

AGAINST

THE HARTFORD FIRE INSURANCE COMPANY, DE FENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT.

The petition in this case states, in substance, that the defendant in error, the Hartford Insurance Company, by its policy of insurance, dated November 11th, 1872, undertook and agreed to insure one W. D. Oldham against loss or damage by fire to the amount of twenty-five hundred dollars upon the building, known as the Phœnix Mills, in Kansas City, Missouri, twelve hundred and fifty dollars thereof upon the building, and twelve hundred and fifty dollars thereof upon machinery contained in said building, for the period of one year from the date of said policy. That said Oldham was, at the date of said policy, and still continued to be largely indebted to the plaintiff in error, and that, to secure said indebtedness, he transferred and assigned said policy to plaintiff in error, and that defendant in error, at the request of said Oldham, transferred said policy to plaintiff in error, by writing upon the face of the same that the loss, if any, should be payable to plaintiff in error, as its interest should appear, and by delivering the policy to plaintiff in error. That, on the 7th day of December, 1872, the property described in said policy " consisting of the building described in said policy,

and the machinery, gearing, belting and engine contained in said building, *together of the value of twenty thousand dollars*, and all being the property of said Oldham, were totally destroyed by fire, by reason of which destruction by fire, said Oldham sustained loss and damage to the amount of twenty thousand dollars." That due proofs of said loss have been made and defendant in error has not paid the amount stipulated in said policy. Judgment is prayed accordingly for twenty-five hundred dollars and interest thereon. (See Record pp. 3–4.)

The policy of insurance sued on was filed as an exhibit with the petition, and contained the following clause appended to the description of the property insured; "*special reference being had to assured's application and survey No. 1462 on file, which is his warranty and a part hereof.*" (See Record p. 10); and also the following condition: "*If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy and a warranty by the assured.*" (See Record p 11).

Said policy also contained the following: "$15,500 *other insurance permitted concurrent herewith.*" (See Record p. 10.)

To this petition defendant in error filed answer setting up several defenses, only one of which it will be necessary to refer to here, as upon that defense the case was tried and judgment rendered in favor of the insurance company. That defense sets forth the condition of the policy above quoted, that if an application etc. be referred to in the policy, it shall be considered a part thereof, and a warranty by the assured; the above quoted reference in the policy to an application; that in and by said application referred to in said policy, which was made and signed by said Oldham, and dated November 11th, 1872, it was stated that the cash value of said building, exclusive of hand and water power, was fifteen thousand dollars, and that the cash value of the machinery therein was fifteen thousand dollars, and that said Oldham thereby warranted that the cash value of said building was fifteen thousand dollars; and that the cash value of said machinery was fifteen thousand dollars; that neither said building nor said machinery were at the time of the value of fifteen thousand dollars, but that said building was not then worth more than five thousand dollars and said machinery was not worth more than five thousand dollars. (See Record pp. 14–15.)

A replication was duly filed putting in issue this defense. A jury was duly waived and the court made the following finding of the facts. (See Record pp. 24–5).

I. On the 11th day of November, 1872, the defendant made

and issued its contract of insurance, the policy sued upon, in words and figures as follows: (See Record p. 10.)

II. The application referred to in said policy and the answers of the assured is in words and figures as follows: (See Record pp. 7, 8, 9 and 10.)

The twentieth question in said application was as follows:

20. "*What is the cash value of the buildings, aside from hand and water power? What is the cash value of the machinery and also the stock in the same?*" The answer made by the applicant, W. D. Oldham, to said question was, "$15,000 *building*; $15,000 *machinery*."

III. At the date of the application and issuing the policy, and at the date of the destruction of the property by fire, on December 7th, 1872, the mill building therein described and insured was, exclusive of hand and water power, of the cash value of eight thousand dollars, and no more, and the machinery therein, insured in the policy, on the same dates, was of the cash value of twelve thousand dollars, and no more. The answers made by the assured to the questions contained in the application, were made by him in good faith, without any intention on his part to commit any fraud on the defendant.

IV. Upon all the facts in issue, except as to valuation of the property insured, at the date of its insurance, the court finds for the plaintiff.

"Under the provisions of the policy and application made part thereof, the court finds as a conclusion of law, that the answers of the assured, as to the value of the property insured, defeat the right to recover on the policy, and accordingly orders judgment for the defendant."

The words '*special reference being had to assured's application and survey No.* 1462, *on file, which is his warranty and a part hereof,*' contained in the policy were *in writing* upon the face of the policy. So it is alleged in the answer. (See Record p. 15). And this is not denied in the replication. The replication denies that by those words reference was made to a certain application, not that the words were so written.

POINTS AND AUTHORITIES.

I. The policy of insurance and the application of Oldham taken together contain a full and perfect warranty on the part

of the assured, *in point of form*, that the building insured was of the value of fifteen thousand dollars, and the machinery of the value of fifteen thousand dollars. Nothing in either instrument or in both construed together in any manner tends to impair or control the ordinary meaning of the word *warranty*, which is used in both.

II. The warranty of value thus effected was an absolute and unconditional warranty that the property was of the value stated in the application, and was not limited by the phrase contained in the application, *so far as the same are known to the applicant, and are material to the risk.* The plain meaning and intention is to make an absolute warranty of all matters stated in the application.

III. Even if the construction of the contract, that the warranty is subject to the limitation contained in the application be adopted, it will be of no avail to plaintiff in error. The covenant in the application is that it *is a just, full and true exposition of all the facts and circumstances in regard to the situation, value and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk.* The meaning is that the applicant has stated all such facts and circumstances within his knowledge, and the facts and circumstances so stated are all that is material to the risk. Having stated facts it is to be presumed that they were known to him. The fact of value was material to the risk, made so by the very terms of the contract, and plainly so under the facts in this case; the insurance obtained and permitted being eighteen thousand dollars, exactly two-thirds of thirty thousand dollars, the value as stated in the application, and very nearly the full amount of the actual value of the property. The property was mortgaged to the amount of twenty thousand dollars. As the applicant represented it, he had an interest in the property to the amount of ten thousand dollars, over the incumbrances, and could only obtain insurance on the property to the extent of two-thirds of its value. Actually the property was incumbered to its full value, and he obtained insurance thereon for very nearly its entire unincumbered value. Value of the subject of insurance is clearly material to the risk in all cases; in this case peculiarly so; and as a matter of law the statement of value was material to the risk.

IV. The value of the property insured is a legitimate and proper subject of a warranty on the part of the insured, in a contract of insurance. It matters not in considering this question whether the statement of the value be material to the risk

or not, nor whether the warranty was made in good or bad faith.

Owens vs. Holland Purchase Ins. Co., 56 *N. Y.* 565.
First N.B'k. of Ballston Spa. vs. Ins. Co. of N. A. 50 *N. Y.* 45.
Ripley vs. The Ætna Ins. Co., 30 *N. Y.* 136.
Ætna Life Ins. Co. vs. France et al, 91 *U. S.* 110.
Jeffries vs. Life Ins. Co., 22 *Wall.* 47.
Leroy vs. The Market Fire Ins. Co., 39 *N. Y.* 90.
Conover vs. The Mass. Ins. Co., 3 *Dill.* 217.
Miles et al vs. Conn. Mut. Life Ins. Co., 3 *Gray*
Campbell vs. New Eng. Mut. Life Ins. Co. 98 *M*
Cooper vs. Farmers Mut. Fire Ins. Co

ARGUMENT.

The learned counsel for the plaintiff in error contends that this case ought to be reversed for two reasons; First, because there was no warranty on the part of Oldham in the contract of insurance; that the building insured was of the value of fifteen thousand dollars, and that the machinery insured was of the value of fifteen thousand dollars; Second, because value cannot be made the subject of warranty in a contract of insurance.

It is contended in the first place that there is in this contract for insurance no *warranty* whatever on the part of the assured; that while the word *warranty* is used, other provisions of the contract plainly show that it was not intended by the parties that this word should have its usual and legal effect. The learned counsel has not distinctly stated what he claims to be the true legal effect and meaning of this contract in this respect, but the fair inference from his argument is, that he considers the statements made by the assured in his application as *representations*, as distinguished from *warranties*, and these statements, being mere representations, proof that they were false will not defeat the plaintiff's action, unless accompanied by proof that these statements, shown to be false, were made by the assured in bad faith, and that they were material to the risk.

To show that the statements in the application are mere representations and are not warranties, various clauses of the application and policy are cited, viz: The application is denominated '*survey of Phœnix Mills*;' certain directions to applicant as to the manner of filling the blanks; the applicant is directed to answer the questions and sign the same '*as a description of the premises on which the insurance will be predicated*;' '*the applicant covenants and agrees to and with said company that the foregoing is a just, full and true exposition of all the facts and circum-*

stances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk.' The policy refers to the application and makes it part of the contract; the policy further provides that '*if* the assured in a written or *verbal application, makes any erroneous representation, or omits to make known any fact material to the risk, the policy shall be void.*' It is difficult to see anything in any of these clauses in any way controlling or impairing the distinct covenant of warranty in terms created by the contract. That the application was denominated a 'survey;' that the applicant was directed how to sign it as a description of the premises, are certainly not inconsistent with an intention that he should warrant the truth of the statements made in the application. These features of the application are no more inconsistent with the full warranty claimed by the defendant to have been effected by the policy and application, taken together, than they are with the concluding clause of the application itself, wherein the applicant covenants that these statements are 'a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk.' The only possible question then that can arise is, whether this covenant of the assured in the application, and the warranty spoken of in the policy, are one and the same thing. Considering them separately the covenant contained in the application is a modified and limited warranty; the provision of the policy that 'if an application, survey, plan, or description of the property herein insured is referred to in this policy, such application survey, plan or description shall be considered a part of this policy and a warranty by the assured,' and the reference in the policy to application and survey No. 1462, constitute a full and perfect warranty of all the statements of the application. Whether, when the two instruments are taken together, as they must be, the full warranty contemplated by the policy shall have effect, or be controlled and limited by the covenant contained in the application, will depend upon a fair construction of the meaning of the contract so effected. In pursuing this inquiry no fairer method suggests itself than that adopted by counsel for plaintiff in error. The insurance companies have prepared blank forms of applications and policies adapted with slight modifications to the various exigencies of the business. The blank application with its covenant of limited warranty is placed in the hands of the applicant and filled and executed by him. The policy blank contains the provision that '*if an application, survey,*

plan or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy and a warranty by the assured.' This form of blank policy leaves it open to the parties to make either a contract of insurance in which the application shall or one in which it shall not be a warranty by the terms of the policy itself. If it is desired to make it a warranty, the application must be referred to; if not, no reference is to be made; nothing is to be done. If no such reference is made and the policy executed, then this provision has no effect, but the limited warranty contained in the application still remains and operates. If the reference is made however, what then? Is it still to be held that only the same limited warranty is effected as when no reference is made? If so, why is the reference made? The act of making it is entirely nugatory. The limited warranty operates of itself without the reference. The rule that every word and act must have its proper meaning is violated and the plain, manifest meaning and intent of the whole transaction is perverted.

The case of *Fitch vs. American Popular Life Ins. Co.*, 59 *N. Y.* 557, has been cited as authority for the construction contended for on the part of plaintiff in error. There is not the slightest resemblance in the policy and application here to those construed in that remarkable case. Here there is not one word calculated to lead the applicant to believe that only *good faith* was required of him in making his statements, while, in that case, the policy was full of asseverations of the honesty of the insurer and of its intention to pay, unless prevented by the fraud of the applicant, and exhortations to the applicant to use good faith as the one thing needful to his security, and finally it contained a statement that *'payment will be contested only in case of fraud,'* all of which the court justly held to be 'inconsistent with the legal effect of a warranty.' Nothing of that kind is to be found in this policy. In the Illinois case no question of warranty was considered. The other clause cited from the policy that *'if the assured, in a written or verbal application, makes any erroneous representation, or omits to make known any fact material to the risk, the policy shall be void,'* so plainly refers to a case in which an insurance is effected upon mere representations, without any warranty or covenant whatever—the blank policies being adapted equally to this kind of contracts—that comment upon it is unnecessary.

It is insisted that the fair interpretation of this contract of

insurance is, that the assured absolutely and without limitation warranted the truth of the statements in his application.

If, however, it should be held that the warranty is limited to the extent of the applicant's covenant in his application, still the breach found by the court falls within that limited warranty, and the judgment must be affirmed. The covenant contained in the application is not, as the counsel for plaintiff in error seems to assume, that the applicant's statements are made in good faith, or that his statements are true, as far as he knows, or that those of them which are material to the risk are true. The covenant is that 'the foregoing is *a just, full and true exposition* of all the facts and circumstances in regard to the condition, situation, *value* and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk.' This is, in effect, a covenant that the applicant's statements are all true, and that, taken together, they constitute a just, full and true exposition, etc. Unless every statement made is true, they cannot together make a true exposition of the facts; they may all be true, and yet not constitute a just, full and true exposition of all the facts known to the applicant and material to the risk. Under this covenant there may be other facts known to the applicant and not stated by him which are not material to the risk, or there may be other facts which are material to the risk, but are not known to him, as to which he is not bound, but he is bound to the extent that the statements made by him are true, and that he knows nothing material to the risk which he has not stated.

The value of the property insured is a matter material to the risk. All insurance contracts are made with direct reference to the value of the property insured. There is no one thing which it is of more importance to the insurer to know than this, before making the policy.

There is no suggestion that the applicant was in any manner misled in making his statement; there is no such plea; nor could such plea avail in the face of his deliberate statement and his covenant that it and his other statements combined were a just and true exposition of the facts in regard to the value, &c., of the property. This covenant has been called a limited warranty of the assured, as it is, in form, but in real effect it is substantially the same as the absolute warranty in the policy, and in some respects it is even broader than that.

It is further contended, in the second place, that although the warranty be perfect in form, it is ineffectual, because the value of the property insured cannot be the subject of a warranty on the part of the assured in a contract of insurance. It

is said that value is a mere matter of opinion, is shifting and indeterminate, and therefore cannot be made the subject of a contract of warranty. Both premise and conclusion are false. That the value of property is not an indefinite and indeterminate element is sufficiently shown by the fact that the law recognizes it as something fixed and capable of determination, and courts are every day engaged in determining questions of value. The issues *quantum meruit* and *quantum valebat* presuppose the capacity of courts to determine values. So, too, contracts regarding the value of property are constantly made. The contract of warranty is just as valid as any other contract regarding values. If two men can meet and by contract fix the value of property at a certain sum, there is no reason why one may not warrant to the other that the value is the same sum. The case of *Owens v. Holland Purchase Ins. Co.*, 56 *N. Y.*, 565, is directly in point upon this question. Grover, J., says: "But the more difficult question in the case is, whether the policy became void by a breach of warranty by the plaintiff, that the farm, with the buildings thereon, which were insured, and in which the personal property insured was situate, were worth $14,000. The plaintiff made a written application to the defendant for the insurance of the property, in which it was stated that the farm and buildings were worth that sum, and that they were encumbered $8,000, by mortgage. The referee finds they were, at the time, worth not less than $10,000 nor more than $12.000 It would follow that, if this application is referred to in the policy, and therein declared to be a part thereof, it became a part of the policy, and was a warranty by the plaintiff, and, the finding showing that it was broken, the policy was void, and no recovery could be had, unless the difficulty was in some way obviated."

It matters not that the matter warranted be entirely unimportant or immaterial; the breach is equally effective in defeating a recovery. In *Jeffries vs. Life Ins. Co.*, 22 *Wall.* 47, and again *Ætna Life Ins. Co. vs. France et al.* 91 *U. S.* 510, this court said:

"We are to observe, also, that other clause of the policy, in which it is declared that this policy is made, by the company and accepted by the insured, upon the express condition and agreement that such statements and declarations (those contained in the application) are in all respects true. This applies to all and to each one of such statements. In other words if the statements are not true it is agreed that no policy is made by the company and no policy is accepted by the insured. * * This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material,

but as to all statements. The statements need not come up to the degree of warranties; they need not be representations even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithfnl performance of this agreement is made an express condition to the existence of a liability on the part of the company. There is no place for the argument, either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it.

"It is the distinct agreement of the parties that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent,and upon that point the judgment of the individual is subject to that of no other tribunal."

Nor does it matter that the erroneous statement be made by accident or mistake, or through ignorance. If by the terms of the policy it is a warranty, the breach is still effective in defeating an action on the policy. In *Campbell vs. New Eng. Mut. Life Ins. Co.*, 98 *Mass.* 381, the court drawing the distinction between warranties and representations, says of the former: "A warranty in insurance enters into and forms a part of the contract itself. It defines by way of particular stipulation, description, condition, or otherwise the precise limits of the obligation, which the insurers undertake to assume. No liability can arise except within those limits. In order to charge the insurers, therefore, every one of the terms which define their obligation must be satisfied by the facts which appear in proof. From the very nature of the case the party seeking his indemnity or payment under the contract, must bring his claim within the provisions of the instrument he is undertaking to enforce. The burden of proof is upon the plaintiff to present a case in all respects, conforming to the terms under which the risk was assumed. It must be not merely a substantial conformity, but exact and literal, not only in material particulars, but in those that are immaterial as well." In *Miles et al. vs. Conn. Mut. Life Ins. Co., supra,* it is said: "Upon the authorities cited for defendant, and upon many others, the statements and declarations contained in the application for insurance, and referred to in the policy, were warranties; and if any of them, whether material

or immaterial to the risk, were untrue, *either from design, mistake or ignorance,* the plaintiffs cannot recover."

In *Conover vs. Mass. Ins. Co., supra,* Judge Dillon says: (3 Dillon 222) "This is the contract the parties made and it is binding upon them; and if the representation shall be found untrue, the policy shall be void."

In *Cooper v. Farmers' Mut. Fire Ins. Co., supra,* the representations contained in the application were made a warranty on the part of the assured by the terms of the policy, and the court says: "Whatever, therefore, the plaintiff represented in his application for insurance he is bound to make good before he can have any resort to the defendants upon the policy, and if the facts in the application were not truly stated, it cannot matter whether they were misstated through mistake or fraud, or whether they were at all material to the risk assumed, for the defendants undertook to pay a loss only in the contingency that these facts were truly stated. That in this case there was a very palpable misstatement in the application for the policy, is not controverted."

Upon the whole case the legitimate conclusions would seem to be:

1. That the statement of value in the application is not a mere representation, but a part of the contract of insurance, made so by the terms of the policy, and whether limited by the covenant in the application itself or not, still an express warranty of the assured. That when the applicant stated the value of the property to be $30,000, he in substance stated *that he knew it to be of that value*; and there being no plea or pretence of ignorance or mistake, if ignorance or mistake could avail him in any case, the presumption remains that he knew what he stated; that the statement of value is clearly material to the risk, and therefore there is nothing in the limitation in the covenant of the assured in the application, 'so far as the same are known to the applicant or are material to the risk,' which excludes the statement of value from the warranty, and that, in any view of the case, there is in form a complete warranty on the part of the assured that the property was of the value stated in the application.

2. That the value of property is a legitimate subject of contracts of any description, including that of warranty.

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